



Restriction of Publication of Part Claimed for redacted information.

**Application for authorisation under s 88(1) of
the *Competition and Consumer Act 2010* (Cth)**

Lodged by:

**Telstra Corporation Limited (InfraCo Fixed), Telstra
Limited (ServeCo) and NBN Co Limited (NBN Co)**

31 March 2022

1 Introduction

- 1.1 The Applicants seek final authorisation by the Commission under section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for the Parties to engage in the Proposed Conduct, as those terms are defined below.

Telstra Group's Corporate Restructure

- 1.2 The Telstra Group is in the process of implementing a legal restructure of its organisation, pursuant to which:
- (a) a new holding company, **New Telstra Corp**, will become the head entity of the Telstra Group (this entity already exists at the time of lodgement of this application as **Telstra Group Limited** (ACN 650 620 303));
 - (b) the following key subsidiaries (each of which also exist at the time of lodgement) will sit beneath New Telstra Corp:
 - (i) **InfraCo Fixed** (currently **Telstra Corporation Limited** (ACN 051 775 556), which will be renamed but for the purposes of differentiation in the interim is currently being referred to as **InfraCo Fixed**) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's passive or physical infrastructure assets (other than the tower assets, which will sit with **InfraCo Towers**, as described below) – i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network;
 - (ii) **ServeCo** (or **Telstra Limited** (ACN 086 174 781), which already exists as an entity within the Telstra Group but which does not currently hold assets) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public. **ServeCo** will also own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets; and
 - (iii) **InfraCo Towers** (or **Amplitel**) – which currently owns and operates the Telstra Group's tower assets. The Telstra Group retains a 51% interest in **Amplitel**,

(together, the **Corporate Restructure**).

- 1.3 For completeness, the Telstra Group also intends to establish its international business under a separate subsidiary, to keep that part of the business together as one entity. The international assets are intended to be transferred to the new international subsidiary over time, subject to relevant approvals and engagement with appropriate stakeholders.
- 1.4 **Annexure A** contains diagrams of Telstra's corporate structure before and after implementation of the Corporate Restructure.
- 1.5 The main part of the Corporate Restructure is the **Scheme** – which comprises the establishment of New Telstra Corp as the head entity of the Telstra Group and the "ServeCo Out" component (to separate **ServeCo** from **InfraCo Fixed**).

Impact of the Corporate Restructure on the Definitive Agreements

- 1.6 Telstra Corporation Limited and NBN Co Limited (ABN 86 136 533 741) (**NBN Co**) are parties to an existing suite of long-term agreements which facilitate the rollout of the national broadband network (**NBN**), including the following:

- (a) Implementation and Interpretation Deed;
 - (b) Subscriber Agreement; and
 - (c) Infrastructure Services Agreement,
- (together the **Definitive Agreements**).¹
- 1.7 The Definitive Agreements were entered into in June 2011, and amended substantively in December 2014 to reflect the move to a multi-technology mix rollout model adopted by NBN Co. Relevantly, the Definitive Agreements:
- (a) provide NBN Co with access to Telstra² infrastructure (including underground ducts and pits through which NBN fibre would run, dark fibre that NBN Co could use for backhaul purposes and rack spaces in Telstra exchanges);
 - (b) provide for the transfer of ownership of Telstra's copper and HFC networks to NBN Co;
 - (c) require NBN Co to make payments to Telstra as Telstra progressively disconnects customers from its legacy copper fixed-line network and broadband customers from its HFC network; and
 - (d) include a fixed-line network preference commitment for Telstra to use NBN Co's network.
- 1.8 Conduct by Telstra Corporation Limited, NBN Co and NBN Co's related entities in entering into, and giving effect to, the Definitive Agreements has been authorised for the purposes of section 51(1) of the CCA by section 577BA of the *Telecommunications Act 1997* (Cth) (**Telco Act**) (**Original Authorisation**).
- 1.9 The Original Authorisation does not extend to Telstra Corporation Limited's related entities, because (unlike NBN Co) Telstra Corporation Limited did not have any related entities at the time the Definitive Agreements were entered into that were required to carry out obligations under the Definitive Agreements and therefore no such entities required the benefit of the statutory authorisation.
- 1.10 In order for the Definitive Agreements to continue to operate as intended following the Corporate Restructure, they will require some amendments. For example, given that the active parts of Telstra's network, as well as Telstra's customer base (retail and most wholesale customers) are being transferred to ServeCo, ServeCo (which is not currently a party to the Definitive Agreements) will be required to agree to and give effect to certain limited rights and obligations under the Definitive Agreements.
- 1.11 The proposed amendments are set out (among other things) in the New ServeCo Agreement executed by InfraCo Fixed, ServeCo and NBN Co on 28 March (**Amending Agreement**).³ They are not intended to create any new restrictions on competition between the Telstra Group on the one hand, and NBN Co on the other. Nor are they intended to expand the scope (or duration) of existing restrictions as a matter of substance. Rather, they are intended to maintain the status quo in respect of the existing competitive environment between Telstra and NBN Co, and preserve the intended effect of the existing Definitive Agreements following the Corporate Restructure, while also addressing some legitimate practical and commercial issues arising from it.
- 1.12 The Parties consider that some of the proposed amendments require authorisation in order to be lawfully entered into and implemented under the CCA amendments. However, the Parties will not have the benefit of the Original Authorisation under section 577BA for entering into and giving effect to those amendments, because it does not extend to Telstra Corporation Limited's (by that time InfraCo Fixed's) related entities such as ServeCo.

¹ The Definitive Agreements are confidential to Telstra Corporation Limited and NBN Co.

² In this document, unless the context suggests or requires otherwise, references to 'Telstra' in the context of describing the existing Definitive Agreements are references to Telstra Corporation Limited as it currently exists.

³ The Amending Agreement is confidential to the Parties.

- 1.13 The purpose of this application is to seek authorisation from the Commission in order to provide similar protection to the Parties and their related entities under section 88(1) of the CCA to that currently provided to Telstra Corporation Limited, NBN Co and NBN Co's related entities under the Original Authorisation in section 577BA of the Telco Act.
- 1.14 The Parties note that the *Telstra Corporation Act and Other Legislation Amendment Act 2021* (Cth) (**Amending Act**) recently inserted a new statutory authorisation provision into section 577BA, as a new section 577BA(10C) (**New Authorisation Provision**). Parliament's intention in doing so was to supplement the Original Authorisation by providing statutory authorisation for changes to the Definitive Agreements in light of Telstra's Corporate Restructure, which may otherwise breach the CCA. However, the New Authorisation Provision is narrowly drafted, and there is some uncertainty as to whether it covers the Proposed Conduct, so the Parties are seeking ACCC authorisation to give effect to the Amending Agreement to provide certainty that their conduct will not contravene Part IV of the CCA.

Timing considerations

- 1.15 The Amending Agreement, by which the necessary amendments will be made, and the Scheme are each subject to a condition precedent that the Commission provide the authorisation sought in this application.
- 1.16 Subject to authorisation being granted, Telstra wishes to complete the Corporate Restructure as quickly as possible this calendar year, given that it is a key component of its existing T22 strategy and will result in the benefits outlined in section 7 below.

2 Parties to the Proposed Conduct

Applicants

- 2.1 For the purposes of section 88(1) of the CCA, the persons applying for authorisation of the Proposed Conduct (**Applicants**) are as follows:

Name, address (registered office), telephone number and ACN	Contact person's name, position, telephone number and email address	Short description of business activities
<p>Telstra Corporation Limited (ACN 051 775 556)</p> <p>Level 41, 242 Exhibition St Melbourne VIC 3000</p> <p>(also referred to in this application as InfraCo Fixed)</p>	<p>Restriction of Publication of Part Claimed</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>Telstra Corporation Limited currently supplies wholesale and retail telecommunications infrastructure and services.</p> <p>Following the Corporate Restructure, Telstra Corporation Limited (which as above will be renamed but for present purposes is being referred to as InfraCo Fixed, although there will be no change to the ACN), will continue to own and operate the Telstra Group's passive or physical infrastructure assets (other than the tower assets) – i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network.</p>

Name, address (registered office), telephone number and ACN	Contact person's name, position, telephone number and email address	Short description of business activities
<p>Telstra Limited (ACN 086 174 781)</p> <p>Level 41, 242 Exhibition St Melbourne VIC 3000</p> <p>(also referred to in this application as ServeCo)</p>	<p>Restriction of Publication of Part Claimed</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>ServeCo already exists as an entity but does not currently hold assets. There will be no change to the ACN as a result of the Corporate Restructure.</p> <p>Following the Corporate Restructure, ServeCo will own and operate the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public. ServeCo will also own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets.</p>
<p>NBN Co Limited (ACN 136 533 741)</p> <p>Level 13, 100 Mount St North Sydney NSW 2060</p>	<p>Restriction of Publication of Part Claimed</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>NBN Co supplies wholesale services to retail services providers using the NBN.</p> <p>For the avoidance of doubt, the Corporate Restructure relates solely to the Telstra Group and does not impact any NBN entities.</p>

Email address for service of documents in Australia

InfraCo Fixed and ServeCo	NBN Co
<p>Restriction of Publication of Part Claimed</p> <p>[REDACTED]</p> <p>[REDACTED]</p>	<p>Restriction of Publication of Part Claimed</p> <p>[REDACTED]</p> <p>[REDACTED]</p>

Other persons who propose to engage in the Proposed Conduct

- 2.2 For the purposes of section 88(2) of the CCA, in addition to the Applicants, authorisation is also sought in respect of the related entities of each Applicant, whether or not those entities exist or are

related entities at the time of this application,⁴ as other persons who may need to engage in aspects of the Proposed Conduct.

- 2.3 This is required given the extended meaning of “party” in section 45AC of the CCA (which provides that if a body corporate is a party to a contract, arrangement or understanding, each body corporate related to that body corporate is taken to be a party to that contract, arrangement or understanding), and given that InfraCo Fixed is required under the Implementation and Interpretation Deed to ensure that its Related Entities comply with the terms of the Definitive Agreements.
- 2.4 The Applicants and the other entities described in this section 2 are collectively referred to in this application as the **Parties**.

3 Proposed Conduct

Description of conduct for which authorisation is sought

- 3.1 As set out above, the proposed amendments to the existing Definitive Agreements are set out in the Amending Agreement. The Amending Agreement provides for:
- (a) the extension of certain rights and obligations in the Subscriber Agreement and Implementation and Interpretation Deed to ServeCo; and
 - (b) the amendment and/or creation of certain rights and obligations in the Subscriber Agreement and Implementation and Interpretation Deed to reflect the inclusion of the ServeCo business (and its related entities);
- as described in section 3.4 below.
- 3.2 The Amending Agreement is expressed as being conditional upon ACCC authorisation, other than the obligations related to seeking such an authorisation which necessarily took effect on execution.
- 3.3 The Parties seek authorisation to engage in conduct to give effect to the Amending Agreement (**Proposed Conduct**).⁵
- 3.4 The primary provisions of the Amending Agreement in relation to which the Parties seek authorisation are described in the table below (noting that the descriptions of the existing provisions of the Definitive Agreements are consistent with previous public disclosures made by the Parties). As the provisions are substantively equivalent to provisions in the Definitive Agreements (with one exception, identified in row 14 below, and described in section 3.7 below) the table contains a summary of the relevant provisions in the existing Definitive Agreements and their equivalents in the Amending Agreement, setting out how they will work under the Amending Agreement. A description of the key definitions referred to in the table below is contained in Annexure B to this Application.

⁴ This means related bodies corporate within the meaning of section 4A of the CCA, and any other entities within the meaning of Related Entity in the Implementation and Interpretation Deed.

⁵ Pursuant to sections 45AM(1) and 45(9) of the ACCC, the making of a contract that contains a cartel provision or that contains a provision in relation to which a corporation intends to apply for authorisation under section 88 of the CCA is not a contravention of sections 45AF, 45AJ or 45 of the CCA if the corporation applies for the grant of an authorisation within 14 days after the contract is made.

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
1	<p>Disconnection regime (including Disconnection Protocols)</p> <p>And relatedly, the following:</p> <ul style="list-style-type: none"> The obligation not to reconnect Limited rights to reconnect Provision of services after disconnection and reconnection 	<p>Broadly speaking, Telstra has an obligation to disconnect premises in the Fixed Line Footprint in a Rollout Region from the Telstra Copper Network and HFC Network, subject to limited exceptions.</p> <p>Telstra must not reconnect premises as defined in the Subscriber Agreement (Premises) disconnected under the Disconnection Protocols again to provide services (nor allow anyone to do so) except in limited circumstances.</p> <p>Telstra may temporarily reconnect services in the event of a material unavailability of the NBN where the NBN is unable to be used to provide any services in the entirety of a region for a specified period. Telstra may permanently reconnect services that have previously been disconnected if NBN Co is insolvent or the NBN permanently ceases ongoing operation.</p> <p>Broadly speaking, Telstra is subject to various restrictions relating to the provision of Copper Services and HFC Services to premises in the Fixed Line Footprint in a Rollout Region after the Disconnection Date for that Rollout Region, subject to limited exceptions.</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> InfraCo Fixed and ServeCo are jointly responsible for the disconnection obligation, including physical and logical steps required to complete a "disconnection". This is necessary because they will each own aspects of the relevant infrastructure. For simplicity, the change control process for the Disconnection Protocols remains between InfraCo Fixed and NBN Co (although ServeCo would be bound by any changes). The obligation not to reconnect and the existing exceptions to disconnection, and limited circumstances in which reconnection is permitted are extended to also apply to ServeCo. For example, currently Telstra is not required to disconnect services between Telstra network elements, and that definition has been amended to clarify that a device owned by either InfraCo Fixed or ServeCo could be a Telstra network element. ServeCo and its Related Entities are subject to the same restrictions as InfraCo Fixed is in relation to what services may be provided before and after disconnection.

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
	<ul style="list-style-type: none"> Survival of some aspects post termination 	<p>Several aspects of the competitive restraints (often referred to as the business protections) will survive termination of the Subscriber Agreement, depending on the circumstances and grounds for termination.</p>	<p>The survival provisions are largely replicated in the Amending Agreement save for the following key differences:</p> <ul style="list-style-type: none"> The termination provisions in the Subscriber Agreement are adjusted to reflect the incorporation of ServeCo as a party to the agreement and to deal with any future partial termination of the agreement which could involve the exit of either ServeCo or InfraCo Fixed. The survival clauses are also adjusted to accommodate that partial termination. The obligations to keep premises disconnected that currently survive termination in certain circumstances will continue to survive termination in those same circumstances, and also apply in some partial termination scenarios to continue to apply to the exiting party. Where ServeCo terminates the Subscriber Agreement in respect of ServeCo only (so that ServeCo is the exiting party and the Subscriber Agreement as between NBN Co and InfraCo Fixed continues) ServeCo will continue to be bound by network preference obligations for premises in the NBN Co Fixed Line Footprint in Rollout Regions where the Ready for Service Date for that Rollout Region is after the date of termination, for as long as network preference obligations apply to InfraCo Fixed. Where NBN Co terminates the Subscriber Agreement in respect of ServeCo only (so that ServeCo is the exiting party and the Subscriber

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
			<p>Agreement as between NBN Co and InfraCo Fixed continues) ServeCo will continue to be bound by network preference obligations for all premises in the NBN Co Fixed Line Footprint, for as long as network preference obligations apply to InfraCo Fixed.</p> <ul style="list-style-type: none"> The Subscriber Agreement provides that a partial termination of the agreement involving only ServeCo will not have the effect of "cross-terminating" any other Definitive Agreements.
2	Not hinder or prevent migration	Broadly speaking, Telstra is required not to hinder or prevent the migration of any Copper Service Subscriber Address or HFC Service Subscriber Address.	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).
3	Fixed line network preference	<p>For 20 years from the Commencement Date (i.e. until March 2032), Telstra must exclusively use the NBN as the fixed line connection to Premises in the NBN Co Fixed Line Footprint to provide fixed line carriage services to those Premises (known as the Network Preference). There are some exceptions to the Network Preference, including:</p> <ul style="list-style-type: none"> where Telstra provides point to point (P2P) fibre services using Telstra fibre in operation (Telstra P2P fibre which is in operation or installed as at the Commencement Date), or fibre installed by Telstra in accordance with a right of first refusal process with NBN Co 	<p>These provisions are replicated in the Amending Agreement, subject to these differences:</p> <ul style="list-style-type: none"> The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment). Where ServeCo and its Related Entities have a right to provide a service under an exception, then InfraCo Fixed and its Related Entities are able to supply that service to ServeCo or its Related Entities on a wholesale basis, for resupply by ServeCo and its Related Entities solely as permitted

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>(described below);</p> <ul style="list-style-type: none"> where Telstra provides interim fibre services including in respect of areas covered by the Commonwealth's greenfields policy (generally speaking, these "interim fibre services" are subject to the same disconnection obligations as for services provided over the Telstra copper network and broadband services on its HFC cable network); and fixed line connections between Telstra network elements. <p>After the 20 year period Telstra is no longer required to preference the NBN Co fixed line network as the connection to premises in the NBN Co Fixed Line Footprint.</p>	by the relevant clause (and vice versa).
4	ROFR exception to Network Preference - Limited right to supply services over newly installed P2P fibre	<p>One exception to the Network Preference is a limited right of Telstra to supply carriage services over new P2P fibre installed by Telstra where:</p> <ul style="list-style-type: none"> the P2P fibre is installed to provide P2P Services in response to a bona fide customer request received by Telstra on or before the Commencement Date (noting this date has passed); or the P2P fibre is installed to provide P2P services to premises that, as at the Commencement Date, Telstra is required to provide to those premises under an existing contract with a Telstra customer (noting this date has passed); or it is otherwise permitted to do so, having complied with the requirements in the Subscriber Agreement giving NBN Co a right of first refusal 	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement allows both InfraCo Fixed and ServeCo to go through the ROFR process with NBN Co, and amends that process to allow ServeCo to provide P2P fibre services using fibre installed by InfraCo Fixed and vice versa.

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>to install such new P2P fibre.</p> <p>Where Telstra installs new P2P fibre, it may only do so:</p> <ul style="list-style-type: none"> if, at the time the P2P fibre is installed there is not sufficient existing unused Telstra P2P fibre available to fulfil the relevant customer requirements; and if the new P2P fibre meets specific capacity limits in the Subscriber Agreement or NBN Co is satisfied as to the capacity requirements of the new fibre. <p>There are safe harbour categories where Telstra may install new Telstra P2P Fibre and provide P2P Services to a premises using that new Telstra P2P Fibre in response to a bona fide customer order without offering NBN Co a right of first refusal. There is also a process for the Parties to include or remove safe harbour categories.</p> <p>After the Commencement Date, Telstra is generally not permitted to supply P2P Services (including over new P2P fibre) to 'demand aggregators' without NBN Co's consent.</p>	
5	Compensation payable to NBN Co if certain services provided over HFC network	<p>Telstra and NBN Co have agreed that Telstra must pay compensation to NBN Co if Telstra or any related entity of Telstra provides a service using the HFC Network to Foxtel Management Pty Limited (for and behalf of the Foxtel Partnership) (Foxtel) within the NBN Co Fixed Line Footprint other than for the broadcast by Foxtel of pay TV services.</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement contains this commitment directly by ServeCo to NBN Co in relation to provision of services by ServeCo or any Related Entity of ServeCo to Foxtel (in addition to InfraCo Fixed's existing commitment).
6	Not own, operate or use any Passive Optical Network	<p>Telstra must not own, operate or use Passive Optical Network (PON) infrastructure, or install PON infrastructure for operation or use</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>by Telstra or its Related Entities, as the fixed line connection to premises in the NBN Co Fixed Line Footprint for 20 years from the Commencement Date (i.e. until March 2032), other than in limited circumstances which include:</p> <ul style="list-style-type: none"> • as required for Telstra's existing PON projects that are specifically listed in the Definitive Agreements; • as required for an optical fibre interim network to provide certain interim services (which includes an interim fibre service to meet Telstra's universal service obligation as defined in section 9 of the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> (Cth) (USO) and its obligations under the Commonwealth's greenfields policy); or • pursuant to a written contract between Telstra and NBN Co for the ownership, operation, use or installation by Telstra of fibre network components. <p>Telstra is also permitted to install new PON fibre networks in limited circumstances in the interim period before NBN Co has rolled out to an area to provide services within a business or government Multi-Dwelling Unit (MDU) or business park in that area, provided Telstra does so in accordance with the requirements of the Subscriber Agreement including giving NBN Co a right of first refusal to install the new PON fibre. Ownership of these PON fibre networks will be transferred to NBN Co once NBN Co has rolled out to the relevant region.</p> <p>Generally, where, pursuant to these exceptions, Telstra is permitted to install, own, operate and/or use PON infrastructure as the fixed-line connection to</p>	<ul style="list-style-type: none"> • The Amending Agreement requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).

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		<p>premises in NBN Co's Fixed Line Footprint for the provision of fixed-line services, it is subject to the same disconnection obligations as apply to Telstra's copper and HFC networks.</p> <p>The PON restrictions do not apply to the PON network Telstra owned in the South Brisbane Exchange area (which Telstra no longer owns).</p>	
7	Restrictions on sale of PON fibre networks	<p>Telstra is restricted from selling its PON fibre networks (other than for scrap or for use overseas if the acquirer is prohibited from using the networks for the provision of services in Australia) to third parties unless NBN Co agrees to the sale. Telstra is also restricted from granting rights to third parties to use the PON network.</p> <p>From the date which is 20 years after the Commencement Date, Telstra will be able to sell the parts of the PON network that are located outside the set of premises that are passed by the NBN Co fixed line network without NBN Co's consent.</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement imposes these restrictions directly on ServeCo (in addition to InfraCo Fixed's existing commitment). This is necessary because while there is no existing PON fibre that will be transferred to ServeCo, if ServeCo (or its Related Entities) builds new PON fibre in the future (as it is permitted to do in limited circumstances, as described above) this PON fibre would need to be subject to the restrictions on non-disposal and transfer.
8	Acquisition by Telstra of a network owner or reseller	<p>If Telstra acquires control over an entity that operates a fibre network and provides fixed-line carriage services over that network to premises within the NBN Co Fixed Line Footprint, Telstra must ensure that the entity ceases to provide those services within 12 months. Similar provisions apply in relation to any acquisition by Telstra of a reseller of non-NBN fixed-line services to premises within the NBN Co Fixed Line Footprint.</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement contains this commitment from ServeCo directly to NBN Co (in addition to InfraCo Fixed's existing commitment).
9	Telstra's marketing of wireless services	<p>Telstra must not promote any wireless voice or wireless data service or any combination of such services as substitutable for a Fibre Service where such promotion</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> The Amending Agreement

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		<p>contravenes the Australian Consumer Law.</p> <p>Telstra is not prevented from promoting a wireless voice or wireless data service (or any combination of such services) as complementary to a Fibre Service.</p> <p>Under the wireless service substitution regime, Telstra is not entitled to payment from NBN Co for disconnection of premises where that premises does not connect to the NBN by a specified date and a relevant person at that premises is in receipt of a Telstra wireless service or Telstra fibre services at that date, but will become entitled to the payment for that premises if it subsequently connects to the NBN within three years of disconnection.</p> <p>There are also provisions which could extend the application of wireless substitution to other members of a relevant account holder's household in certain circumstances.</p>	<p>requires this commitment to be given directly by ServeCo to NBN Co (in addition to InfraCo Fixed's existing commitment).</p> <ul style="list-style-type: none"> The service substitution regime is also extended to cover a situation where there is a service substitution by ServeCo or its Related Entities so that this will impact payments to InfraCo Fixed from NBN Co. ServeCo also agrees to abide by the provisions extending the application of wireless substitution to other members of a relevant account holder's household in certain circumstances.
10	PSAA (Per Subscriber Address Amount) regime	Telstra is entitled to a payment (PSAA Fee) when certain premises are disconnected.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> The Amending Agreement would not amend the PSAA calculation, audit or payment obligations, which would remain between NBN Co and InfraCo Fixed. In some circumstances, ServeCo's actions could lead to a loss of the PSAA payment for InfraCo Fixed (for example if a service substitution occurred due to ServeCo's actions). ServeCo agrees to co-operate with auditors where relevant. ServeCo can be audited directly as to whether it has maintained effective control procedures regarding the

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			process of preparation of relevant fee calculations. ServeCo agrees to provide information, access to records etc and co-operate with a fee auditor engaged to perform an audit of Telstra's calculation of a PSAA Fee.
11	Substantial Adverse Events (SAE)	<p>Telstra or NBN Co may invoke a process which will result in an amendment to the Subscriber Agreement if the other party engages in activities which have the effect of substantially affecting the business of the affected party in particular markets.</p> <p>For Telstra, the markets are the market for the supply of mobile carriage services in Australia or market for the supply of retail carriage services to consumers, businesses or governments in Australia. Specific examples of an SAE in relation to Telstra will include (but are not limited to):</p> <ul style="list-style-type: none"> • NBN Co providing services on a non-wholesale basis by directly providing services to parties who are not persons to whom NBN Co is permitted to supply under the <i>National Broadband Network Companies Act 2011</i> (Cth) (NBN Companies Act) (as at 23 June 2011); • NBN Co supplying a routing or switching service between two locations which are NBN connected (or one location and a public network such as the internet) (excluding certain permitted services such as routing or switching between a premises and a Point of Interconnect); or • NBN Co supplying mobile services. <p>For NBN Co, the market is for provision of carriage services to premises. Specific examples of an</p>	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> • The Amending Agreement amends the SAE regime so that the Parties continue to receive substantially the same rights and benefits as a whole as they do today post the Corporate Restructure, including by specifying that: <ul style="list-style-type: none"> • InfraCo Fixed and ServeCo could jointly notify NBN Co that a Substantial Adverse Event had occurred in relation to InfraCo Fixed and ServeCo; • InfraCo Fixed and ServeCo's conduct would be considered together when assessing whether conduct of InfraCo Fixed and/or ServeCo has amounted to a Substantial Adverse Event in relation to NBN Co; and • The effect of NBN Co's conduct on the businesses of InfraCo Fixed and ServeCo considered together will be considered in assessing whether conduct of NBN Co has amounted to a Substantial Adverse Event in relation to InfraCo Fixed and

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>SAE in relation to NBN Co would include (but are not limited to):</p> <ul style="list-style-type: none"> Telstra systematically using its rights under the P2P right of first refusal process in the Definitive Agreements to materially increase the quantity and extent of P2P fibre in rollout regions in advance of the NBN Rollout over and above the quantity and extent of P2P fibre that would be implemented by Telstra based on market trends and bona fide demand at the time. <p>There are provisions which allow the Parties to engage in certain activities in particular markets or by exercising particular rights, without triggering the amendment process.</p> <p>If an SAE has occurred and the affected party has initiated the relevant procedure, the Parties are required to negotiate a variation to the Subscriber Agreement. Such variation could:</p> <ul style="list-style-type: none"> modify or delete specified clauses of the Subscriber Agreement to an extent which is proportionate to the competitive activities that gave rise to the SAE; modify or delete any other provisions of the Subscriber Agreement in a way which puts the affected party in a position to more effectively compete with the other party, to an extent which is proportionate to the competitive activities that gave rise to the SAE; and/or impose restrictions on the party engaging in conduct in competition with the affected party to an extent which is proportionate to the competitive activities that gave rise to the SAE and which, to the extent practicable, have the effect of putting each party in the same 	<p>ServeCo.</p> <p>For completeness, InfraCo Fixed, NBN Co and ServeCo will also work with the ACCC to amend the SAE Undertaking to incorporate ServeCo (as appropriate) so that any proposed amendments to the updated Subscriber Agreement pursuant to the SAE clause in relation to ServeCo will also go through the same ACCC review process contemplated by the current undertaking.</p>

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
		<p>position in which it would have been had that SAE not occurred.</p> <p>Any variation to the Subscriber Agreement pursuant to this provision is subject to ACCC review and consent, as a result of a section 87B undertaking given to the ACCC by Telstra and NBN Co (SAE Undertaking).</p>	
12	Disposal of Telstra Copper/HFC networks	Telstra and NBN Co have agreed that Telstra may not 'dispose' of its copper and HFC networks except in certain limited circumstances.	<p>These provisions are replicated in the Amending Agreement, subject to the following differences:</p> <ul style="list-style-type: none"> The Amending Agreement clarifies that InfraCo Fixed is able to grant licences to ServeCo or its Related Entities to allow them to access, occupy, use, maintain, repair, replace, modify and install Telstra copper assets/HFC assets or use the copper and HFC networks, for the supply of carriage services to itself or any other person. However, if InfraCo Fixed grants such a licence: ServeCo and its Related Entities must be subject to the same restrictions on use and granting rights to use etc, that apply to Telstra under the Definitive Agreements and the terms of the licence must be consistent with Telstra's obligations and not adversely affect NBN Co's rights under the Definitive Agreements, Continuity Agreement and Pre-Transfer Installed Assets Agreement. ServeCo must and must ensure its Related Entities comply with the same restrictions as apply to Telstra under the Definitive Agreements, and act in a way consistent with Telstra's obligations under the

#	Definitive Agreement provision	Brief description of provision	Equivalent provision in the Amending Agreement
			Definitive Agreements, Continuity Agreement and Pre-Transfer Installed Assets Agreement.
13	Disposal of NBN Co Copper/HFC assets	There are also restrictions on the circumstances in which NBN Co may dispose of copper and HFC assets it has acquired from Telstra, which requires Telstra's consent.	<p>These provisions are replicated in the Amending Agreement, subject to the following difference:</p> <ul style="list-style-type: none"> The Amending Agreement includes a new provision to replace this clause which clarifies that ServeCo has the same rights and obligations as Telstra, and to give NBN Co the same rights and obligations in respect of ServeCo that it has in respect of Telstra, except that ServeCo's consent for a disposal is not required by NBN Co and ServeCo does not have a right to terminate the agreements in the event of breach by NBN Co of these provisions.
14	Restrictions on transfer of ServeCo	The existing arrangements do not contemplate the splitting of Telstra Corporation Limited's business or assets.	<p>The ServeCo Arrangements would include a requirement that ServeCo must not transfer the whole, or substantially the whole, of its business without first ensuring that the acquirer of that business enters into an agreement with NBN Co to ensure that the competitive restraints that currently apply to Telstra (and that will be owed by ServeCo to NBN Co as a result of the Amending Agreement) will continue to apply to the acquirer of that business. Entry into and implementation of such agreement would be subject to compliance with the then applicable competition law and, if necessary, obtaining authorisation.</p> <p>See paragraph 3.7 below for more detail.</p>

3.5 For completeness, the Amending Agreement also reflects updates to other provisions, such as the confidentiality and intellectual property requirements and liability provisions, as summarised below.

#	Additional key amendments included for completeness		
15	Confidentiality⁶ and Intellectual Property	Telstra and NBN Co have agreed processes regarding the exchange and permitted / prohibited uses of confidential information and intellectual property, and information security measures. This includes prohibitions on the improper use of confidential information.	These provisions are replicated in the Amending Agreement, subject to the following difference: <ul style="list-style-type: none"> The Amending Agreement expands the confidentiality and IP regimes to also include ServeCo. Importantly, there is no relaxation of the permitted purpose concepts and the same restrictions on ensuring no party uses or discloses information to gain an unfair competitive advantage continues to apply.
16	Liability	The current liability provisions are drafted on a bilateral basis.	The Amending Agreement clarifies that InfraCo Fixed would, in general, not be liable for any breach by ServeCo of ServeCo's obligations to NBN Co under the Subscriber Agreement after ServeCo's accession. The key exception to this is the obligation to disconnect, for which InfraCo Fixed and ServeCo would be jointly and severally liable.

Rationale for the Proposed Conduct

- 3.6 The purpose of the Amending Agreement is to maintain the status quo following the Corporate Restructure, and ensure the legal entities that will undertake the operational activities to which certain existing contractual obligations attach, will continue to be subject to those obligations following the Corporate Restructure. The Proposed Conduct will ensure the Subscriber Agreement and Implementation and Interpretation Deed continue to operate as intended, consistent with the Government's agenda of structural reform of the telecommunications industry.
- 3.7 In terms of the new restriction on future transfers of the ServeCo business (or substantially the whole of the ServeCo business) (see row 14 of section 3.4 above):
- (a) This provision ensures that the competitive restraints that currently apply to Telstra (and that will be owed by ServeCo to NBN Co under the Amending Agreement) would continue to apply to the ServeCo business, regardless of whether it is disposed of via share sale or an asset sale. If the ServeCo business is sold via a share sale, the obligations in the Amending Agreement would still apply to the corporation under its new ownership. This provision ensures the same outcome in the event that ServeCo sold its business via an asset sale.

⁶ For completeness, as the Commission will be aware, the Migration Plan also includes information security obligations in respect of NBN Co Migration Information. These obligations currently require Telstra to: (a) act in a manner that is consistent with the Information security principles in Schedule 6 to the Migration Plan; (b) notify the ACCC of any NBN Co Migration Information Telstra wishes to use or disclose, including the measures Telstra will take to ensure that the use or disclosure does not allow Telstra to gain or exploit any unfair commercial advantage over Telstra's Wholesale Customers; and (c) comply with other confidentiality obligations Telstra has to NBN Co under the Definitive Agreements. Following the Corporate Restructure, ServeCo and InfraCo Fixed will each be required to comply with the same information security obligations which Telstra is currently subject to under the Migration Plan, pursuant to new sub-section 577BEA(1) which will be inserted into the Telco Act following scheme implementation, and which will provide that each obligation and prohibition imposed on or applicable to, Telstra under the Migration Plan, is imposed instead on each of InfraCo Fixed and ServeCo (as well as another designated Telstra successor company specified by the Minister by legislative instrument).

- (b) Its purpose is consistent with the above principle, being to ensure that the existing (authorised) competitive restraints are maintained and legitimately applied to the relevant business that was originally owned and operated by Telstra.
- (c) From NBN Co's perspective, the Definitive Agreements helped to facilitate the structural separation of Telstra, and resulted in significant payments from NBN Co to Telstra for the disconnection of customers from Telstra's legacy networks. In return, Telstra agreed to certain competitive restraints (as above, often referred to as the **business protections**) in the Definitive Agreements. The Amending Agreement and the application of the existing restrictions to ServeCo (and the ServeCo business, in the event of a future sale) will ensure that NBN Co continues to receive the value under the Definitive Agreements for which it has already paid.

- 3.8 For the avoidance of doubt, the Parties are not seeking authorisation of any actual future sale of ServeCo (whether by share sale or asset sale). Any such transaction would be subject to competition law requirements, including (if necessary) separate authorisation at that time.
- 3.9 In terms of the new liability provision, this simply reflects the tripartite nature of the Amending Agreement.

Term of authorisation sought

- 3.10 Subject to paragraph 3.12 below, the Parties seek authorisation for the Proposed Conduct until 30 June 2034. With the exception of those relevant provisions identified at 3.12 below, this reflects the latest potential end date of the majority of relevant provisions identified above at section 3.4, which generally continue until the earlier of:
- (a) 7 March 2032 (which is 20 years after the Commencement Date of the Subscriber Agreement); or
 - (b) termination on a permanent basis of the operation of the entire NBN Co fixed line network (which is a 'Permanent Cessation of Operations').
- 3.11 However, if NBN Co continues to create 'Rollout Regions' until early March 2032, then obligations under the Disconnection Protocols could extend to the end of June 2034.
- 3.12 The following provisions identified in section 3.4 may continue to operate beyond June 2034 (or at least are not expressly stated to cease after 20 years like most others), so the Parties are seeking authorisation in relation to those provisions for as long as they remain on foot, as follows:

Provision	Term of authorisation sought	Reasons for and impact of extended authorisation
Disposal of NBN Co Copper/HFC assets (see row 13 in the table at section 3.4 above)	The term of authorisation sought for conduct pursuant to this provision is for as long as this provision remains on foot.	This reflects the existing term of the current provision between Telstra and NBN Co and is commensurate with the current authorisation under s 577BA of the Telco Act.
Restrictions on sale of PON fibre networks Acquisition by Telstra of a network owner or reseller (see rows 7 and 8 in the table at section 3.4 above)	To the extent that any aspects of these provisions operate beyond 30 June 2034, the term of authorisation sought for conduct pursuant to these provisions is for so long	This reflects the fact that these provisions are not expressly stated to cease on the date that is 20 years after the Commencement Date like most of the other provisions and is commensurate with the current

Provision	Term of authorisation sought	Reasons for and impact of extended authorisation
	as they continue to operate.	authorisation under s 577BA of the Telco Act.
Compensation payable to NBN Co if certain services provided over HFC network (see row 5 in the table at section 3.4 above)	To the extent that this provision continues to operate beyond 30 June 2034, the term of authorisation sought for conduct pursuant to this provision is for so long as it continues to operate.	This reflects the fact that this provision is not expressly stated to cease on the date that is 20 years after the Commencement Date like most of the other provisions and is commensurate with the current authorisation under s 577BA of the Telco Act.

Provisions of the CCA which might apply to the Proposed Conduct

- 3.13 InfraCo Fixed and ServeCo, and their related entities, may be considered to be competitors or potential competitors of NBN Co, in respect of the supply of fixed-line telecommunications services (particularly given the extended meaning of “party” in section 45AC of the CCA).
- 3.14 Absent the authorisation, the Proposed Conduct may therefore give rise to an allegation in relation to and/or contravention of one or more of sections 45AF, 45AG, 45AJ and/or 45AK of the CCA and/or one or more of sections 45 or 47 of the CCA. The Parties also seek authorisation in respect of section 46 of the CCA since it might be alleged that one or more of the Parties might have a substantial degree of market power in a relevant market, acknowledging that the Original Authorisation which currently applies to the Definitive Agreements protects the Parties from claims under Part IV of the CCA.

Persons who may be directly impacted by the Proposed Conduct

- 3.15 There are no persons who are likely to be directly impacted by the Proposed Conduct, given the fact the Proposed Conduct is not intended to impact the outcome or effect of the existing Subscriber Agreement or Implementation and Interpretation Deed as a matter of substance.

4 Market information

Structural reform of the telecommunications industry

- 4.1 In 2009, the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.
- 4.2 To facilitate the successful roll out of the NBN, the Government also took a number of other legislative and regulatory steps to implement structural reform of the telecommunications industry, with the aim of bringing about “a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company”.⁷
- 4.3 In this context, Telstra Corporation Limited and NBN Co entered the Definitive Agreements, which facilitate the rollout of the NBN. This includes the Subscriber Agreement, which contains a number of restrictions on Telstra Corporation Limited’s ability to compete with NBN Co in the NBN Co ‘Fixed Line Footprint’, being the geographic areas in which NBN Co intends to roll out its fixed line network.

Authorisation of the Definitive Agreements

- 4.4 The Government took steps to ensure that conduct by Telstra Corporation Limited and NBN Co in giving effect to its structural reform agenda would not contravene Part IV of the CCA.

⁷ Explanatory Statement, Telecommunications (Structural Separation—Networks and Services Exemption) Instrument (No. 1) 2011.

- 4.5 This was achieved by way of amendments to the Telco Act which specifically authorised certain conduct for the purposes of section 51(1) of the CCA. Section 51(1) relevantly provides that in deciding whether a person has contravened Part IV of the CCA, anything specified in, and specifically authorised by, another Commonwealth Act must be disregarded.
- 4.6 Telstra Corporation Limited and NBN Co's (and NBN Co's related entities) conduct in entering into and giving effect to the Definitive Agreements was (and continues to be) specifically authorised for the purposes of section 51(1) of the CCA by the Original Authorisation in section 577BA of the Telco Act.⁸
- 4.7 Telstra Corporation Limited is required under the Implementation and Interpretation Deed to ensure that its related entities comply with the terms of the existing Definitive Agreements. However, the Original Authorisation in section 577BA does not extend to Telstra Corporation Limited's related entities, because at the time section 577BA was included in the Telco Act, Telstra Corporation Limited did not have any related entities that would be required to give effect to the Government's reform agenda (and that therefore required the protection of authorisation). Separately, upon Scheme implementation, the Amending Act provides authorisation for Telstra Corporation Limited's related bodies to engage in conduct to facilitate Telstra Corporation Limited's compliance with the *existing* Definitive Agreements, but not the Definitive Agreements as amended by the Amending Agreement.

Impacts of the Corporate Restructure

- 4.8 Following the Corporate Restructure, in order for the Definitive Agreements to continue to function as intended, ServeCo will need to agree that it and its related entities will comply with the Amending Agreement. Other related entities of ServeCo may also need to give effect to the Amending Agreement from time to time.
- 4.9 However, the gap in the Original Authorisation means that the Parties will not have the benefit of that statutory authorisation when engaging in the Proposed Conduct. ACCC authorisation is therefore required.

5 Counterfactual

- 5.1 An assessment of the likely public benefits and detriments of the Proposed Conduct requires a comparison of a future in which the Proposed Conduct occurs (the **factual**), against a future in which the Proposed Conduct does not occur (the **counterfactual**).⁹
- 5.2 Neither the Amending Agreement nor the Corporate Restructure will proceed without ACCC authorisation.¹⁰ Therefore, the counterfactual for the purpose of this application is that:
- (a) the Corporate Restructure does not proceed; and
 - (b) the existing Definitive Agreements between Telstra Corporation Limited and NBN Co (including the Subscriber Agreement and Implementation and Interpretation Deed) continue to operate as authorised by section 577BA of the Telco Act.
- 5.3 As the Definitive Agreements are in place in both the factual and counterfactual, it is not relevant for the purpose of this authorisation application to consider the public benefits or detriments (including any potential competitive effects) which result from those existing arrangements.
- 5.4 Rather, the Commission's inquiry is limited to considering the public benefits and detriments that flow from the Proposed Conduct. This means the Commission's inquiry is limited to considering the public benefits and detriments that flow from:

⁸ The section 577BA authorisation is extended to Part XIB of the CCA by section 151AJ(9) of the CCA, which provides that a person does not engage in anti-competitive conduct if, under section 577BA of the Telco Act, the conduct is authorised for the purposes of section 51(1) of the CCA.

⁹ *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

¹⁰ The Amending Agreement (and the Corporate Restructure more generally) is subject to the Parties obtaining authorisation from the Commission for the Proposed Conduct.

- (a) the Corporate Restructure;
- (b) the extension of certain rights and obligations to ServeCo and/or amendment or creation of them to contemplate ServeCo pursuant to the Amending Agreement; and
- (c) the Parties engaging in conduct to give effect to the Amending Agreement,

to (and only to) the extent those benefits or detriments or competitive effects would not already result from the existing arrangements.

6 Public detriments

- 6.1 There are no public detriments resulting from the Proposed Conduct.
- 6.2 In the counterfactual, Telstra Corporation Limited and NBN Co would continue to operate under the terms of the existing Subscriber Agreement and Implementation and Interpretation Deed, as authorised by section 577BA of the Telco Act. In both the future without the Proposed Conduct, and the future with the Proposed Conduct, the Telstra Group ceases to be a network competitor of NBN Co in some markets, and the market structure (including NBN Co's role in those markets) remains the same.
- 6.3 The Proposed Conduct does not produce any additional public detriment above that which already exists pursuant to the existing arrangements (if any), as there is no material impact to the outcome or intent of them as a result of the Amending Agreement.
- 6.4 To the extent that the Proposed Conduct adds a 'new' provision to the existing arrangements regarding restrictions on the transfer of the ServeCo business, this does not give rise to any additional public detriments, because – as explained above at paragraph 3.7 – it is simply intended to preserve the substance and effect of the existing arrangements in a tripartite (rather than bilateral) environment.
- 6.5 Further, there is no public detriment likely to result from the Corporate Restructure itself.

7 Public benefits

- 7.1 As the Corporate Restructure will not proceed in the counterfactual, it is relevant to consider the public benefits that arise as a result of the Corporate Restructure, in applying the net public benefit test.
- 7.2 The Corporate Restructure is a key step in Telstra achieving its T22 and T25 strategies and will result in a range of public benefits, including:
 - (a) **Greater transparency:** Following the Corporate Restructure, ServeCo and InfraCo Fixed will be separate legal entities and the clearer separation between their respective businesses and financials will provide greater transparency for shareholders and allow potential investors to more accurately value each business.
 - (b) **Enhanced focus on operations and strategy:** The separation of ServeCo and InfraCo Fixed will improve the focus on the operations of, and facilitate individual strategies for, each business, which is expected to deliver value to Telstra's broad shareholder base over time. It will also better enable ServeCo to focus on creating innovative products and services, supporting customers and delivering the best possible customer experience.
 - (c) **Flexibility for future value realisation opportunities:** The separation of the Telstra Group's assets into separate legal entities will create flexibility for potential value realisation opportunities in respect of those infrastructure assets in the future, placing Telstra in a better position to take advantage of future market conditions and opportunities as and when they arise, for the benefit of its shareholders.
 - (d) **Other benefits associated with the creation of a passive infrastructure only business:** The trend toward functional and legal separation within telecommunications industries has


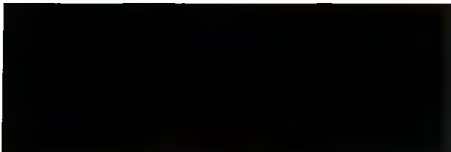
already gained momentum internationally, for reasons including financial and market motivations and operational and strategic benefits. These examples, and this trend more generally, demonstrate the concrete benefits and value resulting from restructuring telecommunications businesses to separate out the infrastructure components, as is proposed for InfraCo Fixed and ServeCo through the Corporate Restructure.

8 Competitive effects

- 8.1 The Proposed Conduct will not have the effect or likely effect of substantially lessening competition.
- 8.2 As above, in the counterfactual, Telstra Corporation Limited and NBN Co would continue to operate under the terms of the existing Subscriber Agreement and Implementation and Interpretation Deed, as authorised by section 577BA of the Telco Act.
- 8.3 In both the future without the Proposed Conduct, and the future with the Proposed Conduct, the Telstra Group ceases to be a network competitor of NBN Co in some markets, and the market structure (including NBN Co's role in those markets) remains the same.

9 Interested parties

- 9.1 The Parties have identified the following entities who may be relevant interested parties for the purpose of this application:

Party	Contact details
Australian Communications Consumer Action Network (ACCAN)	(02) 9288 4000 / info@accan.org.au PO Box 639, Broadway NSW 2007
Department of Infrastructure, Transport, Regional Development and Communications	Restriction of Publication of Part Claimed   GPO Box 594 Canberra, ACT 2601
Better Internet for Rural, Regional & Remote Australia (BIRRR)	birraus@gmail.com
National Farmers Federation (NFF)	(02) 6269 5666 Locked Bag 9, Kingston ACT 2604
Communications Alliance	(61) 2 9959 9111 PO Box 444, Milsons Point NSW 1565

10 Declaration by each Applicant

Declaration on behalf of Telstra Corporation Limited (ACN 051 775 556) (InfraCo Fixed)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Bill Gallagher (Mar 31, 2022 13:36 GMT+10)

Signature of authorised person

Name: Bill Gallagher

Position title: Regulatory Affairs & Legal Services Executive - Sustainability, External Affairs & Legal

Date: 31 March 2022

Declaration on behalf of Telstra Limited (ACN 086 174 781) (ServeCo)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application.

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Bill Gallagher (Mar 31, 2022 13:36 GMT+10)

Signature of authorised person

Name: Bill Gallagher

Position title: Regulatory Affairs & Legal Services Executive - Sustainability, External Affairs & Legal

Date: 31 March 2022

Declaration on behalf of NBN Co Limited (ACN 136 533 741) (NBN Co)

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.

The undersigned undertake(s) to advise the Commission immediately of any material change in circumstances relating to the application.

The undersigned are aware that giving false or misleading information is a serious offence and are aware of the provisions of sections 137.1 and 149.1 of the Criminal Code (Cth).



Jane van Beelen (Mar 31, 2022 14:55 GMT+11)

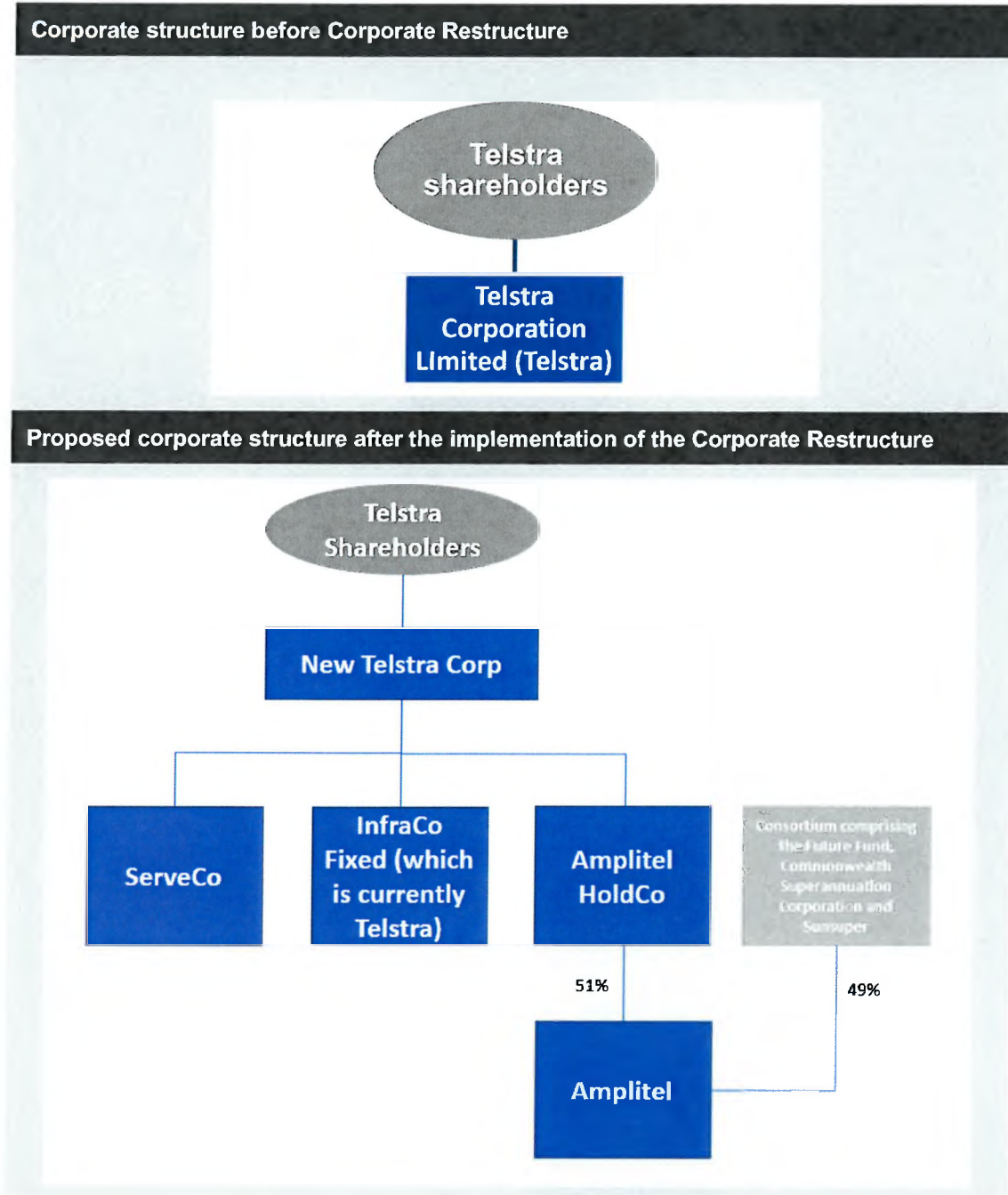
Signature of authorised person

Name: Jane van Beelen

Position title: Chief Legal and Regulatory Officer

Date: 31 March 2022

ANNEXURE A – Corporate structure before and after implementation of the Corporate Restructure¹¹



¹¹ These are simplified structure diagrams illustrating the key entities only.

ANNEXURE B – Relevant definitions based on the Definitive Agreements

The following table describes key relevant defined terms, based on definitions in the Definitive Agreements:¹²

Term	Meaning
Commencement Date	means the date that all of the conditions precedent are either waived in accordance with the Implementation and Interpretation Deed or satisfied, which occurred on 7 March 2012.
Copper Service	means: <ul style="list-style-type: none"> (a) a carriage service provided by Telstra or a Related Entity of Telstra or ServeCo or a Related Entity of ServeCo using a Telstra Copper Line other than a NBN based service; or (b) a Carriage Service provided by Telstra or a Related Entity of Telstra or ServeCo or a related entity of ServeCo over an NBN Co copper line using a continuity licence.
Copper Service Subscriber Address	means a Premises in respect of which a Copper Service is provided.
Definitive Agreements	means the Implementation and Interpretation Deed, the Subscriber Agreement, the Infrastructure Services Agreement, the Pre-Transfer Installed Assets Agreement, the Access Deed, the Deed of Amendment and Restatement, the Continuity Deed, the Structural Separation Undertaking, the Final Migration Plan, the Amending Agreement and any other document agreed by the Parties to be a Definitive Agreement.
Disconnection Date	means the date for each Rollout Region set in accordance with the Disconnection Protocols.
Fibre Service	means a fixed line carriage service provided using optical fibre as the fixed line connection to Premises.
Fixed Line Footprint	means: <ul style="list-style-type: none"> (a) the geographic areas in which NBN Co intends to Rollout as determined by NBN Co in its absolute discretion and identified in the overall rollout plan, excluding the parts of those geographic areas that are in Rollout Regions in respect of which the disconnection commencement date or region ready for service date (as applicable) has occurred; and (b) for each Rollout Region in respect of which the disconnection commencement date or region ready for service date (as applicable) has occurred, the set of Premises notified from time to time by NBN Co to Telstra under the Subscriber Agreement as the Premises which are passed and which NBN Co intends in its absolute discretion will be passed in that Rollout Region.
HFC Network	means the hybrid fibre coaxial cable network, over which Telstra was in a position to exercise control as determined and defined under the Implementation and Interpretation Deed.

¹² Some of the definitions have been abridged for legibility.

Term	Meaning
HFC Service	means a carriage service provided by Telstra or a Related Entity of Telstra or ServeCo or a Related Entity of ServeCo using an HFC Line, other than a permitted service, HFC management service, or NBN based service.
HFC Service Subscriber Address	means a Premises in respect of which an HFC Service is provided.
P2P Services	means end to end fixed line carriage services provided or to be provided on a point to point basis.
Point of Interconnect	means a point of interconnection between the NBN Co fixed line network and the access seeker's network, as determined by NBN Co.
Related Entity	means, for a person, each related body corporate of that person and any entity which is controlled by that person, from time to time, but in the case of Telstra does not include a Foxtel entity or the Foxtel partnership to the extent it is not controlled by Telstra or any of Telstra's Related Entities.
Rollout	means the design, construction and making operational of the NBN Co fixed line network.
Rollout Region	is defined in the Subscriber Agreement and includes an initial release rollout region, an acquired network rollout region, an in-fill rollout region and a target rollout region.
Subscriber Agreement	means the document entitled "Subscriber Agreement" between NBN Co and Telstra executed on or about the execution date, to which ServeCo acceded as a party in accordance with the Amending Agreement.
Telstra Copper Network	means the network in Australia over which Telstra is in a position to exercise control as determined and defined under the Implementation and Interpretation Deed.
Telstra P2P Fibre	is defined in the Subscriber Agreement as point to point, unswitched optical fibre which is owned by Telstra or a Related Entity of Telstra or ServeCo or a Related Entity of ServeCo and connects the Premises in various ways depending on, for example, whether the Premises is in an MDU and excludes certain optical infrastructure.



Submission by Telstra Corporation Limited (InfraCo Fixed), Telstra Limited (ServeCo) and NBN Co (NBN Co) to the ACCC

In support of the application for authorisation under s 88(1) of the *Competition and Consumer Act 2010* (Cth) dated 31 March 2022

31 March 2022

Contents

1	Executive Summary	2
	Introduction	2
	Context for the Application	2
	Scope of the Commission's inquiry	2
	The Proposed Conduct will result in a net public benefit, such that authorisation should be granted	3
2	Current regulatory landscape and existing authorisations	3
	Structural reform of the telecommunications industry	3
	Definitive Agreements between Telstra Corporation Limited and NBN Co	4
	SSU and Migration Plan	4
	Authorisation of the SSU, Migration Plan and Definitive Agreements under section 577BA of the Telco Act	5
	The Commission's assessment of the SSU, Migration Plan and Definitive Agreements	5
	Other regulatory safeguards	7
3	Telstra's Corporate Restructure	8
4	Proposed Conduct for which authorisation is sought	10
5	Term of authorisation sought	10
6	Counterfactual	10
7	No public detriments	12
	No public detriment results from the Proposed Conduct	12
8	Public benefits	13
	Clear public benefits of the Proposed Conduct	13
	Public benefits of structural reform of the telecommunications industry	16
9	Competitive effects	18
	The Proposed Conduct is not likely to substantially lessen competition	18
10	Conclusion	18

1 Executive Summary

Introduction

- 1.1 This submission is made by the Applicants in support of (and should be read in conjunction with) the application dated 31 March 2022 for final authorisation under section 88(1) of the CCA for the Parties to engage in the Proposed Conduct (**Application**). Unless the context suggests otherwise, capitalised terms used in this submission have the same meaning as in the Application.
- 1.2 The Applicants submit that the Commission should authorise the Proposed Conduct by the Parties because it will not result in any public detriment and will generate clear public benefits. Accordingly, the Proposed Conduct will result in a net public benefit.

Context for the Application

- 1.3 Telstra Corporation Limited and NBN Co's conduct in entering into and giving effect to the Definitive Agreements is currently authorised by the Original Authorisation in section 577BA of the Telco Act. That authorisation only extends to Telstra Corporation Limited, NBN Co and NBN Co's related entities, and not to other related entities of Telstra Corporation Limited. This is because, unlike NBN Co, Telstra Corporation Limited did not have any related entities at the time the Definitive Agreements were entered into that were required to give effect to the Definitive Agreements or the structural separation undertaking (**SSU**), and therefore they did not require the benefit of the statutory authorisation.
- 1.4 The Telstra Group is currently in the process of restructuring its organisation. The Corporate Restructure is not intended to impact the substance, outcome or effect of the Definitive Agreements. However, in order for them to continue to function as they were intended following the Corporate Restructure, some amendments will need to be made. In particular ServeCo will need to agree to and give effect to certain limited rights and obligations under the Definitive Agreements (and/or certain rights and obligations will need to be amended to formally contemplate ServeCo), including by engaging in the Proposed Conduct. Other related entities of ServeCo may also need to give effect to those limited rights and obligations from time to time.
- 1.5 Following the Restructure, the Parties will not have the benefit of the Original Authorisation under section 577BA, because the Original Authorisation does not extend to the conduct of Telstra Corporation Limited's related entities.
- 1.6 Additionally, notwithstanding Parliament's intention to supplement the Original Authorisation by providing statutory authorisation for changes to the Definitive Agreements in light of Telstra's Corporate Restructure, the New Authorisation Provision is narrowly drafted, so the Parties are seeking ACCC authorisation to give effect to the Amending Agreement to provide certainty that their conduct will not contravene Part IV of the CCA.¹
- 1.7 The purpose of the Application is to address the above by seeking a limited and specific authorisation from the Commission in order to provide similar protection to the Parties and their related entities under section 88(1) of the CCA to that currently provided to Telstra Corporation Limited, NBN Co and NBN Co's related entities under section 577BA of the Telco Act.

Scope of the Commission's inquiry

- 1.8 The counterfactual is that the Corporate Restructure does not proceed, and the existing Definitive Agreements between Telstra Corporation Limited and NBN Co (including the Subscriber Agreement and Implementation and Interpretation Deed) simply continue on foot as authorised by section 577BA of the Telco Act.

¹ The Amending Agreement is confidential to the Parties.

- 1.9 In light of the counterfactual, the Commission's inquiry ought to be limited to considering the public benefits or detriments which result from:
- (a) the Corporate Restructure;
 - (b) extension of certain rights and obligations to ServeCo and/or amendment or creation of them to contemplate ServeCo pursuant to the Amending Agreement (as described in the Application); and
 - (c) the Parties engaging in conduct to give effect to the Amending Agreement,
- to (and only to) the extent those benefits or detriments or competitive effects would not already result from the existing arrangements.

- 1.10 Any public benefits or detriments (including any potential competitive effects) resulting from the existing arrangements under the Definitive Agreements themselves are not relevant, because the Definitive Agreements are in place in both the factual and counterfactual.

The Proposed Conduct will result in a net public benefit, such that authorisation should be granted

- 1.11 The Proposed Conduct will not result in any public detriments because:
- (a) there is no public detriment resulting from the Corporate Restructure itself;
 - (b) the Proposed Conduct does not produce any additional public detriment above that which already exists pursuant to the current arrangements (if any), as there is no material change to the outcome or intent of the existing arrangements as a result of the Amending Agreement; and
 - (c) in both the factual and counterfactual, the Telstra Group ceases to be a network competitor of NBN Co in some markets. The Proposed Conduct has no bearing whatsoever on that outcome.
- 1.12 On the other hand, the Corporate Restructure will result in material, tangible public benefits which are commercially likely to occur, including:
- (a) enhanced value to Telstra shareholders over time, including through:
 - (i) an improved and more tailored focus on the operations of, individual strategies for and innovation by, each of ServeCo and InfraCo Fixed;
 - (ii) greater flexibility for future value realisation opportunities, including in relation to infrastructure assets; and
 - (b) greater transparency for Telstra shareholders, for example of operations, across ServeCo and InfraCo Fixed.

The Proposed Conduct will therefore clearly result in a net public benefit, such that authorisation should be granted.

2 Current regulatory landscape and existing authorisations

Structural reform of the telecommunications industry

- 2.1 In 2009, the Government announced that it intended to establish a company, NBN Co, to build and operate a wholesale-only, open access NBN.

- 2.2 The Government took a number of other legislative and regulatory steps to implement structural reform of the telecommunications industry, with the aim of bringing about “*a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company*”.²
- 2.3 A comprehensive governance and regulatory framework was also established, principally via the *National Broadband Network Companies Act 2010* (Cth) and amendments to the CCA and Telco Act, to ensure that NBN Co would “*remain true to its wholesale-only mandate and deliver open and equivalent access to retail providers, thereby providing a platform for retail-level competition to flourish*.”³
- 2.4 A key aspect of the Government’s structural reform was the progressive migration of customers from Telstra’s copper and HFC networks to the new wholesale-only fibre network.⁴ This progressive migration is facilitated by a number of key agreements and undertakings, as described below.

Definitive Agreements between Telstra Corporation Limited and NBN Co

- 2.5 Telstra Corporation Limited and NBN Co entered into the Definitive Agreements, a suite of long-term agreements which facilitate the rollout of the NBN, including the following which remain on foot:
- (a) Implementation and Interpretation Deed;
 - (b) Subscriber Agreement; and
 - (c) Infrastructure Services Agreement.
- 2.6 Under the Definitive Agreements Telstra Corporation Limited agreed, among other things, to:
- (a) disconnect its copper and HFC broadband networks and to transfer ownership of them progressively to NBN Co; and
 - (b) prefer the NBN network as the fixed line connection to premises.
- 2.7 The Subscriber Agreement also contains a number of restrictions on Telstra Corporation Limited’s ability to compete with NBN Co in the NBN Co Fixed Line Footprint,⁵ in order to facilitate the structural separation by migration in accordance with the Government’s objectives. These are further supported by additional provisions in the other Definitive Agreements, in particular the Implementation and Interpretation Deed.
- 2.8 Telstra Corporation Limited is also required to ensure that its related entities comply with the terms of the Definitive Agreements.

SSU and Migration Plan

- 2.9 Telstra Corporation Limited provided a SSU under section 577A of the Telco Act, and an associated Final Migration Plan (**Migration Plan**). The substance of the obligations in the SSU and Migration Plan are not impacted by the Corporate Restructure, but are described below for context.
- 2.10 The Commission was responsible for assessing and accepting the draft SSU and approving the draft Migration Plan, following a public consultation.
- 2.11 The SSU provides that from 1 July 2020 (the designated date), Telstra Corporation Limited will not:

² Explanatory Statement, Telecommunications (Structural Separation—Networks and Services Exemption) Instrument (No. 1) 2011.

³ Explanatory Memorandum, National Broadband Network Companies Bill 2010.

⁴ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010.

⁵ Descriptions of ‘Fixed Line Footprint’ and other key relevant defined terms based on the Definitive Agreements is contained in an annexure to the Application.

- (a) supply Non-Exempt Services to retail customers in Australia using a Non-Exempt Network over which Telstra is in a position to “control” (as defined in section 577Q of the Telco Act); or
- (b) be in a position to exercise “control” (as defined in section 577P of the Telco Act) over a company that supplies Non-Exempt Services to retail customers in Australia using a Non-Exempt Network over which Telstra is in a position to control.

2.12 The Migration Plan sets out the steps that Telstra Corporation Limited will take to progressively migrate voice and broadband services from its copper and HFC networks to the NBN. The Migration Plan forms part of the SSU.⁶

Authorisation of the SSU, Migration Plan and Definitive Agreements under section 577BA of the Telco Act

2.13 The Government took steps to ensure that conduct by Telstra Corporation Limited and NBN Co in giving effect to its structural reform agenda would not contravene Part IV of the CCA. This was achieved by way of amendments to the Telco Act which specifically authorised certain conduct by Telstra Corporation Limited and NBN Co for the purposes of section 51(1) of the CCA:

“in recognition that Telstra’s progressive migration of customers from its copper and subscription television cable networks to the new wholesale-only fibre network, in accordance with an undertaking accepted by the ACCC, is in the national interest and will promote structural reform of the telecommunications industry.”⁷

2.14 Section 51(1) of the CCA relevantly provides that, in deciding whether a person has contravened Part IV of the CCA, anything specified in, and specifically authorised by, another Commonwealth Act must be disregarded.⁸

2.15 The Original Authorisation in place under section 577BA of the Telco Act authorises certain conduct that may otherwise contravene Part IV of the CCA, including:

- (a) Telstra Corporation Limited and NBN Co’s (and NBN Co’s related entities) conduct in entering into and giving effect to the Definitive Agreements; and
- (b) Telstra Corporation Limited’s conduct in relation to the SSU and Migration Plan.

2.16 The Original Authorisation under section 577BA currently only extends to Telstra Corporation Limited and (where relevant) NBN Co and NBN Co’s related entities, and not to other related entities of Telstra Corporation Limited. This is because at the time section 577BA was introduced into the Telco Act, Telstra Corporation Limited did not have any related entities that would be required to give effect to the Government’s reform agenda (and that therefore required authorisation).

The Commission’s assessment of the SSU, Migration Plan and Definitive Agreements

2.17 Several limbs of the authorisation in section 577BA of the Telco Act, including those in relation to the SSU, Migration Plan and the Definitive Agreements, only came into force following an assessment and acceptance of the SSU, and approval of the Migration Plan, by the Commission.

2.18 As part of its assessment, the Commission also considered the Definitive Agreements, as the associated commercial arrangements between Telstra Corporation Limited and NBN Co which implement the structural separation. The Commission’s assessment included a public consultation.

⁶ Telco Act, section 577BE(5).

⁷ Explanatory Memorandum, Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010.

⁸ The section 577BA authorisation is extended to Part XIB of the CCA by section 151AJ(9) CCA, which provides that a person does not engage in anti-competitive conduct if, under section 577BA of the Telco Act, the conduct is authorised for the purposes of section 51(1) of the CCA.

- 2.19 As part of its assessment, the Commission considered “*the effect of the structural reform upon competition and consumer interests*”,⁹ and made findings in respect of the overall pro-competitive impacts of the SSU, Migration Plan and Definitive Agreements, including:
- (a) “*The ACCC considers that the proposed network consolidation, to be effected by the SSU and the Definitive Agreements, will implement the Government’s intended structural reform. This structural reform is likely to significantly reduce the extent of Telstra’s control over relevant fixed-line facilities.*”¹⁰
 - (b) “*... the ACCC has had regard to the difference between the likely future with and future without the SSU... In summary, the ACCC is of the view that the SSU implements a form of structural reform that responds to the longstanding competition concerns that arise from Telstra’s vertical integration across fixed line access networks and downstream service provisioning.*”¹¹
 - (c) “*Although there is likely to be some reduction in competition in downstream markets due to the reduction in upstream competition, this is likely to be balanced by improvements to the competitive behaviour demonstrated by downstream competitors. However, whilst the way in which retail service providers will compete will change with the transition from the legacy copper network to the new fibre network, overall it is expected that the degree of competitive tension in downstream markets is unlikely to significantly change than if Telstra’s structural separation did not come into force.*”¹²
 - (d) “*... the ACCC’s view is that there will be sufficient levels of competition in downstream telecommunications markets so that the productive efficiencies arising from the network consolidation will be passed onto consumers as long as those efficiencies are reflected in NBN Co’s wholesale prices.*”¹³
 - (e) “*There are other potential benefits and detriments for consumers that may flow from the SSU coming into force. In particular, consumers are likely to benefit from the earlier realisation of structural reform that will occur with the SSU.*”¹⁴
 - (f) “*With implementation of the SSU (and the Definitive Agreements), structural reform and the long term benefits that can be derived from such reform will be achieved sooner. Improvements in the communications sector can increase the productivity capabilities of an economy over time in a number of ways. These can include growth flowing directly from the investment in communications infrastructure, businesses that use that communications infrastructure being able to engage in new and enhanced activities that may potentially reduce transaction costs and inherent positive network externalities where the network becomes of increasing value to users as more users subscribe to the network.*”¹⁵
- 2.20 In reaching these findings, the Commission considered the Definitive Agreements in detail, including both the provisions that “*directly facilitate the network consolidation*”¹⁶ as well as matters arising from the Definitive Agreements “*not directly related to the achievement of network consolidation*”.¹⁷ The latter included the following specific provisions of the Subscriber Agreement:
- (a) The Substantial Adverse Events (or **SAE**) clause, which allows Telstra Corporation Limited or NBN Co to invoke a process which will result in an amendment to the Subscriber Agreement if the other party engages in activities which have the effect of substantially affecting the business of the affected party in particular markets.

⁹ ACCC, Assessment of Telstra’s Structural Separation Undertaking and draft Migration Plan, Final Decision, Public Version (February 2012) (**Final Decision**) page 1.

¹⁰ Final Decision, page 30.

¹¹ Final Decision, page 31.

¹² Final Decision, page 37.

¹³ Final Decision, page 41.

¹⁴ Final Decision, page 41.

¹⁵ Final Decision, page 45.

¹⁶ Final Decision, page 16.

¹⁷ Final Decision, pages 48-61.

As a result of concerns expressed by the Commission in respect of this clause, Telstra Corporation Limited and NBN Co jointly gave a section 87B undertaking (**SAE Undertaking**), under which Telstra Corporation Limited and NBN Co undertook not to vary any of the Definitive Agreements pursuant to the SAE clause without engaging in a public review process overseen by the Commission, and obtaining the Commission's consent.

The Commission noted in its Final Decision on the SSU and Migration Plan that the SAE Undertaking provides a transparent review process, and mitigates the concerns the Commission had expressed about the potential for SAE variations receiving the benefit of legislative authorisation without regulatory oversight.¹⁸

- (b) A restriction on Telstra promoting wireless services as substitutable services for fibre services (described in the Commission's Final Decision as the 'Wireless Promotion Restriction'). Following concerns raised during the Commission's consultation, this clause was amended by Telstra Corporation Limited and NBN Co to provide that Telstra must not promote wireless services as substitutable for fibre services where such promotion would be misleading or deceptive. The Commission's view was that this "*resolve[d] the concerns raised by the original restriction as it merely replicates obligations that Telstra would have under the ACL.*"¹⁹

The Commission also considered a separate provision in the Subscriber Agreement which provides that Telstra is not entitled to any fee for disconnecting a premises if that premises is not connected to the NBN within six months after the Disconnection Date and an individual at that premises contracts with Telstra for a wireless service (described in the Commission's Final Decision as the 'Wireless Substitution Provision'). The Commission's view was that "*this provision has a legitimate role in the Definitive Agreements due to the disconnection model of payments negotiated between NBN Co and Telstra ... it is a necessary function of the form of structural separation by migration.*"²⁰

Importantly, the Commission concluded that "*the revised wireless restrictions would not have a significant effect upon Telstra's competitive activities in the supply of wireless voice and broadband services ...[and] will not have any significant detrimental impact on consumers or competition in relevant markets.*"²¹

Other regulatory safeguards

- 2.21 In its previous assessment of the SSU and Definitive Agreements, the Commission also took into account the fact that NBN Co would be a highly regulated entity, and the ability of regulation to provide ongoing safeguards regarding NBN Co's ability to exercise any market power, for example through the use of mechanisms such as price regulation.²²
- 2.22 The Commission recognised that while regulation may not be a perfect replacement for competition, the risk of monopolistic behaviour by NBN Co could be mitigated by the regulatory regime established by the Government.²³
- 2.23 The Commission plays a key role in regulating NBN Co, including through special access undertakings, and maintains significant oversight of the terms and conditions (including price) of NBN access and services.
- 2.24 The ACCC also has oversight of changes to the Definitive Agreements that are triggered by activities that substantially affect Telstra Corporation Limited or NBN Co's businesses in relevant markets, as a result of the SAE Undertaking.

¹⁸ Final Decision, page 52.

¹⁹ Final Decision, page 54.

²⁰ Final Decision, page 54.

²¹ Final Decision, page 54.

²² Final Decision, page 32, 40. See also Attachment 3A to the Final Decision.

²³ Final Decision, page 40.

3 Telstra's Corporate Restructure

- 3.1 The Telstra Group is in the process of implementing a legal restructure of its organisation. The restructure involves:
- (a) the creation of a new holding company, **New Telstra Corp**, which will become the head entity of the Telstra Group (this entity already exists at the time of lodgement of the application as **Telstra Group Limited** (ACN 650 620 303));
 - (b) the following key subsidiaries (each of which also exist at the time of lodgement) sitting beneath New Telstra Corp:
 - (i) **InfraCo Fixed** (currently **Telstra Corporation Limited (ACN 051 775 556)**, which will be renamed but for the purposes of differentiation in the interim is currently being referred to InfraCo Fixed) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's passive or physical infrastructure assets (other than the tower assets, which will sit with InfraCo Towers, as described below) – i.e. the ducts, passive fibre networks, data centres, poles, tunnels and certain fixed network sites that underpin the Telstra Group's fixed telecommunications network;
 - (ii) **ServeCo** (or **Telstra Limited (ACN 086 174 781)**, which already exists as an entity within the Telstra Group but which does not currently hold assets) – which will initially be a wholly-owned subsidiary of New Telstra Corp and will own and operate the Telstra Group's customer facing business, including the provision of retail and wholesale carriage services to the public. ServeCo will also own the active parts of the Telstra Group's network, including the radio access network and mobile spectrum assets; and
 - (iii) **InfraCo Towers** (or **Amplitel**) – which currently owns and operates the Telstra Group's tower assets. The Telstra Group retains a 51% interest in Amplitel,
- (together, the **Corporate Restructure**).
- 3.2 The Corporate Restructure will be facilitated by way of a scheme of arrangement and is currently scheduled to be completed by the end of calendar year 2022.
- 3.3 For completeness, the Telstra Group also intends to establish its international business under a separate subsidiary, to keep that part of the business together as one entity. The international assets are intended to be transferred to the new international subsidiary over time, subject to relevant approvals and engagement with appropriate stakeholders.

Implications of the Corporate Restructure within the current regulatory landscape

- 3.4 In response to the Corporate Restructure, the Government has passed the Amending Act, which is intended to ensure regulatory equivalence across the restructured Telstra Group by ensuring that various regulatory obligations – including the SSU – that currently fall on Telstra Corporation Limited (which will become InfraCo Fixed) will also fall on the new entities in roughly the same way.
- 3.5 This has been achieved by way of a new concept in the Telco Act to 'repoint' those obligations to 'Telstra successor companies' and 'designated Telstra successor companies'. Each of ServeCo and InfraCo Fixed will fall into these categories.
- 3.6 The Corporate Restructure, and the Proposed Conduct, is not intended to impact the substance, outcome or effect of the Definitive Agreements.
- 3.7 However, in the context of the Corporate Restructure and the repointing of existing regulatory obligations, in order for the Definitive Agreements to continue to function as intended following the Corporate Restructure, ServeCo will need to agree to and give effect to (or at least be acknowledged

in) certain limited rights and obligations under the Definitive Agreements, including by engaging in the Proposed Conduct.²⁴

- 3.8 The Parties will not have the benefit of the Original Authorisation under section 577BA for that conduct, because that statutory authorisation does not extend to related entities of Telstra Corporation Limited.
- 3.9 The New Authorisation Provision (section 577BA(10C)) inserted into the Telco Act by the Amending Act was intended to supplement the Original Authorisation by providing statutory authorisation for changes to the Definitive Agreements in light of Telstra's Corporate Restructure, which may otherwise breach the CCA.
- 3.10 Under section 577BA(10C) of the Telco Act, for a contract, arrangement or understanding to be authorised under the New Authorisation Provision, it must have the "sole purpose" of doing one or more of the four specific matters expressly set out in the provision, namely, to:
- (a) provide that an existing obligation imposed on Telstra under the Definitive Agreements *extends* to ServeCo, New Telstra Corp or Amplitel;
 - (b) provide that an existing right conferred on Telstra under the Definitive Agreements *extends* to ServeCo, New Telstra Corp or Amplitel;
 - (c) provide that an existing obligation that an NBN corporation owes to Telstra under the Definitive Agreements *extends* so that the obligation is also owed to ServeCo, New Telstra Corp or Amplitel;
 - (d) provide that an existing right that an NBN corporation has against Telstra under the Definitive Agreements *extends* so that the right is also against ServeCo, New Telstra Corp or Amplitel.
- 3.11 These categories are narrow, and it is possible that they do not clearly cover all the amendments the parties need to make to ensure the Definitive Agreements continue to operate as intended. For instance, not all of the amendments 'extend' rights and obligations.
- 3.12 Given the Amending Agreement contains matters beyond those listed in section 577BA(10C), even though those matters are clearly benign from a competition law perspective, there is some uncertainty as to whether the 'sole purpose' test will be satisfied. If not, the entire Amending Agreement (or any arrangement or understanding including the Amending Agreement) could potentially lose the benefit of the New Authorisation Provision, even if the other matters contained in it would not require authorisation.
- 3.13 Consequently, the parties are not confident that the New Authorisation Provision will protect the entry into, and giving effect to, the Amending Agreement.
- 3.14 Given the very serious consequences of Telstra, ServeCo and NBN Co entering into and giving effect to a contract, arrangement or understanding that contains provisions that may be cartel provisions, without the benefit of authorisation, the parties are unwilling to rely solely on the New Authorisation Provision.
- 3.15 Finally, upon Scheme implementation, the Amending Act will further amend the Telco Act to provide authorisation for Telstra Corporation Limited's related bodies to engage in conduct to facilitate Telstra Corporation Limited's compliance with the existing Definitive Agreements. However, this will not apply to the Definitive Agreements as amended by the Amending Agreement.

²⁴ ServeCo will not need (or indeed be able) to give effect to all of the obligations in the Subscriber Agreement (and the SSU and Migration Plan) to disconnect premises from the legacy network or not reconnect premises previously disconnected, to the extent these relate to the copper and HFC networks, because Telstra's copper and HFC networks will remain owned by InfraCo Fixed. However, given that the active parts of Telstra's network, as well as Telstra's customer base (retail and most wholesale customers) are being transferred to ServeCo, ServeCo will be required to agree to and give effect to certain rights and obligations under the Definitive Agreements as set out in the Amending Agreement.

- 3.16 This means that without authorisation from the Commission, the Parties would be exposed to potential contravention of certain prohibitions in Part IV of the CCA by engaging in the Proposed Conduct.
- 3.17 As a result, the purpose of the Parties' application is to seek authorisation from the Commission in order to provide similar protection to the Parties (and their related entities) under section 88(1) of the CCA to that currently provided to Telstra Corporation Limited, NBN Co and NBN Co's related entities under section 577BA of the Telco Act.

4 Proposed Conduct for which authorisation is sought

- 4.1 As set out in the Application, the Parties seek authorisation to give effect to the Amending Agreement. The primary provisions of the Amending Agreement in relation to which the Parties seek authorisation are described in the Application.

5 Term of authorisation sought

- 5.1 The term of the Amending Agreement does not extend beyond the dates contemplated by the Definitive Agreements, and the parties seek authorisation of the Proposed Conduct for a term that is commensurate.
- 5.2 The term of authorisation sought (until 30 June 2034) reflects the final possible Disconnection Date under the Subscriber Agreement (being 20 years after the Commencement Date) plus a period in which to action those final disconnections in accordance with the contractual arrangements.
- 5.3 The term of authorisation sought reflects the long-term nature of the existing Definitive Agreements, which was and continues to be necessary to ensure the viability of NBN Co's business case in the context of the Government's long term structural reform agenda.
- 5.4 Specifically:
- (a) Subject to paragraphs (b) and (c) below, the Parties are seeking authorisation for the Proposed Conduct until 30 June 2034. This term of authorisation is appropriate because it reflects the latest potential end date of the majority of relevant provisions, which generally continue until the earlier of:
 - (i) 7 March 2032 (which is 20 years after the Commencement Date); or
 - (ii) termination on a permanent basis of the operation of the entire NBN Co Fixed Line Network (which is a "Permanent Cessation of Operations").

However, if NBN Co continues to create Rollout Regions until early March 2032, then obligations under the Disconnection Protocols could extend to the end of June 2034.

- (b) The key exception is the clause of the Amending Agreement that amends the *Disposal of NBN Co Copper/HFC assets provision* (described in row 13 in the table at section 3.4 of the Application), for which the term of authorisation sought is for so long as that provision in the Definitive Agreements remains on foot. This is appropriate because it reflects the existing term of the current provision between Telstra and NBN Co. The Parties currently have authorisation under s 577BA of the Telco Act for giving effect to that provision in the Definitive Agreements for as long as the provision remains on foot. The Parties seek authorisation to give effect to the clause of the Amending Agreement that reflects the Disposal of NBN Co Copper/HFC assets provision in the Definitive Agreements for a period that is commensurate in order to provide similar protection to the Parties (and their related entities).
- (c) For completeness, the provisions relating to *Restrictions on sale of PON fibre networks*, *Acquisition by Telstra of a network owner or reseller* and *Compensation payable to NBN Co if certain services provided over HFC network* (described in rows 7, 8 and 5 of in the table at section 3.4 of the Application) are not expressly stated to cease on the date that is 20 years after the Commencement Date. So, to the extent that any aspects of these provisions

operate beyond 30 June 2034, the term of authorisation sought for conduct pursuant to those provisions (as included in the Amending Agreement) is for so long as they continue to operate. Again, this is commensurate with the existing authorisation under 577BA of the Telco Act.

6 Counterfactual

- 6.1 An assessment of the likely public benefits and detriment of the Proposed Conduct, as well as any competitive effects, requires a comparison of a future in which the Proposed Conduct occurs (the **factual**), against a future in which the Proposed Conduct does not occur (the **counterfactual**).²⁵
- 6.2 As explained in the Application, the Amending Agreement (and the Corporate Restructure more generally) are subject to (and therefore cannot proceed without) the Parties obtaining authorisation from the Commission for the Proposed Conduct.
- 6.3 In short, this is because:
- (a) Telstra Corporation Limited (which will become InfraCo Fixed) is contractually required to comply with the existing Definitive Agreements, and to ensure that its related entities also comply with them. Currently, there are no relevant related entities that are required to do so.
 - (b) Following the Corporate Restructure though, this will change, because the current business of Telstra Corporation Limited will effectively be split in two, as between InfraCo Fixed and ServeCo. For reasons already explained, ServeCo – having received the active parts of Telstra's network, as well as its customer base – will need to give effect to some of the existing obligations in the Definitive Agreements, but will not be able to take on others, for example in relation to the passive or physical infrastructure assets of the existing business that are required to be progressively disconnected. As a result, it is not a simple matter of novation.
 - (c) The existing Definitive Agreements are not set up to operate in this kind of tripartite environment, with the result that they need amending.
 - (d) The Amending Agreement has been negotiated with a view to including amendments that are necessary from the perspective of each party in order to ensure that the Definitive Agreements continue to operate as intended. Its provisions need to be considered as a package.
 - (e) The necessary amendments include provisions which would otherwise breach the CCA, but which would not be covered by any existing authorisation.
 - (f) Given the very serious consequences breaching the CCA, and in particular the cartel prohibitions, this is not a risk Telstra or NBN Co are willing to accept, and is not a risk that Telstra can expect its shareholders to accept as part of the scheme process.
 - (g) Therefore, the Corporate Restructure cannot realistically proceed without authorisation.
- 6.4 Accordingly, the counterfactual for the purpose of this application is that:
- (a) the Corporate Restructure does not proceed; and
 - (b) the existing Definitive Agreements between Telstra Corporation Limited and NBN Co (including the Subscriber Agreement and Implementation and Interpretation Deed) continue on foot as authorised by section 577BA of the Telco Act.
- 6.5 In light of the counterfactual, the assessment of the public benefits, detriments and competitive effects likely to result from the Proposed Conduct is necessarily a very narrow one.

²⁵ *Re Medicines Australia Inc* [2007] ACompT 4 at [120].

- 6.6 As the Definitive Agreements are in place in both the factual and counterfactual, it is not relevant for the Commission to consider the public benefits or detriments (including any potential competitive effects) which result from those existing arrangements.
- 6.7 The scope of the Commission's inquiry is limited to considering the public benefits or detriments or competitive effects which result from:
- (a) the Corporate Restructure, as it would not proceed in the counterfactual;
 - (b) extension of certain rights and obligations to ServeCo and/or amendment or creation of them to contemplate ServeCo pursuant to the Amending Agreement; and
 - (c) the Parties engaging in conduct to give effect to the Amending Agreement,
- to (and only to) the extent those benefits or detriments or competitive effects would not already result from the existing arrangements.

7 No public detriments

No public detriment results from the Proposed Conduct

- 7.1 There will not be any public detriments resulting from the Proposed Conduct. This is so even on the broadest possible interpretation of public detriment, being "*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*"²⁶
- 7.2 In both the future with the Proposed Conduct, and the future without the Proposed Conduct, the Telstra Group ceases to be a network competitor of NBN Co in some markets, and the market structure (including NBN Co's role in those markets) remains the same, as intended by the Government's structural reform agenda. The Proposed Conduct has no bearing whatsoever on the intended structural outcome.
- 7.3 In the counterfactual, Telstra Corporation Limited and NBN Co would continue to operate under the terms of the existing Subscriber Agreement and Implementation and Interpretation Deed, as authorised by section 577BA of the Telco Act.
- 7.4 As a result, any public detriments (including competitive effects) which result from the existing Subscriber Agreement and Implementation and Interpretation Deed (or the broader program of structural reform) cannot be taken into account in considering the public detriments that are likely to result from the Proposed Conduct. In any event, the Commission has previously considered similar issues, in its assessment of the SSU, Migration Plan and Definitive Agreements.²⁷
- 7.5 The Proposed Conduct does not produce any additional public detriment above that which already exists pursuant to the current arrangements (if any), as there is no change to the outcome or effect of them as a result of the Amending Agreement. The only change is to the entity giving effect to or benefiting from them and/or their practical mechanics to reflect their intent.
- 7.6 Those practical mechanics necessarily include some new provisions to deal with issues not currently contemplated in the Subscriber Agreement at a time when all the relevant functions sat within the same Telstra entity. This includes clarifications regarding liability as between InfraCo Fixed and ServeCo and provisions which will ensure that NBN Co will maintain the benefit of the business protections in the event of a transfer of the ServeCo business.
- 7.7 The latter is consistent with the principle of ensuring that the existing (authorised) protections are maintained and legitimately follow the relevant business that was originally owned and operated by

²⁶ *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

²⁷ See above at paragraphs 2.17-2.20.

Telstra, and also that NBN Co continues to receive the value of its investment under the Definitive Agreements.

- 7.8 It is also consistent with the amendments to the Telco Act to enable the repointing of regulatory obligations which also contemplate that Telstra may dispose of businesses via share or asset sales and that, regardless of the form of the disposal, relevant obligations should remain attached to that business.
- 7.9 While this obligation does not currently feature in the Definitive Agreements, it does not, as a matter of substance, expand the scope of previously agreed (and authorised) restrictions under the Definitive Agreements. (It will also not lessen competition, for the reasons outlined in section 9.4.)
- 7.10 From a commercial perspective, the business protections were and remain a key reason for NBN Co agreeing to enter into the Definitive Agreements, which in turn remain essential to achieving the Government's long term structural reform agenda. Their avoidance by means of any future asset transfer would significantly undermine that agenda and NBN Co's significant investment to date.
- 7.11 For the avoidance of doubt, no such transfer or third party investments in either InfraCo Fixed or ServeCo are currently being contemplated by Telstra, and no authorisation is being sought for any such transaction at this time. Any such transaction would be subject to competition law requirements, including (if necessary) separate authorisation or merger clearance at that time.
- 7.12 It is therefore not necessary or appropriate for the Commission to speculate as to the nature (or potential detriments or competitive effects) of any future transactions in respect of InfraCo Fixed or ServeCo as part of its assessment of the Proposed Conduct.
- 7.13 The current authorisation sought is purely in relation to the Parties agreeing now that a feature of any such future transaction will be the continuation of the business protection obligations owed to NBN Co, subject to all necessary competition law approvals at the time.
- 7.14 Further, there is no public detriment likely to result from the Corporate Restructure itself.
- 7.15 While the Proposed Conduct does not result in any relevant public detriment, it does, as explained in section 8, result in clear public benefits.

8 Public benefits

Clear public benefits of the Proposed Conduct

- 8.1 The CCA does not define "public benefit". However, the Commission has traditionally given this term a broad meaning,²⁸ and the Australian Competition Tribunal has held that the term should be given its widest possible meaning. It includes:

*"anything of value to the community generally, any contribution to the aims pursued by the society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress."*²⁹

- 8.2 It has also been held that:

*"the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources... (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and.. commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency."*³⁰

²⁸ ACCC Guidelines for Authorisation of Conduct (non-merger) (March 2019), 8.1.

²⁹ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242; *Re 7-Eleven Stores* (1994) ATPR 41-357.

³⁰ *Re 7-Eleven Stores Pty Limited* (1994), ATPR 41-357 at [42,677]. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012, at 17,242 and *VFF Chicken Meat Growers' Boycott Authorisation* (2006) ACompT 9 at [75].

- 8.3 The public benefits must be “*causally related to the conduct authorised*”.³¹ They must be such that they will, in a tangible and commercially practical way, result from the Proposed Conduct.³² It is not necessary for the Applicants “*to quantify, in precise terms, the benefits claimed to arise if authorisation is granted but there must be a factual basis for concluding that the public benefits are likely to result*”.³³
- 8.4 As the Corporate Restructure will not proceed in the counterfactual, it is relevant to consider the public benefits that arise as a result of the Corporate Restructure, in applying the net public benefit test. These public benefits are additional to those which flow from the conduct the subject of the existing authorisation under section 577BA of the Telco Act, and would not arise in the counterfactual.
- 8.5 There must be a real chance of the public benefits eventuating, although it is not necessary to show that benefits are certain to occur, or more probable than not to occur.³⁴ Public benefits also need not be substantial, though they must rise above the ephemeral and the trivial.³⁵
- 8.6 Public benefits are not limited to benefits that flow directly to consumers, users, and purchasers.³⁶ It is recognised, for example, that benefits flowing to shareholders (for example, in the form of dividends), or cost savings being returned to the company for future investment, are legitimate public benefits.³⁷ This is especially so where dividends are likely to flow to a wide range of Australian shareholders, as is the case for Telstra dividends.³⁸
- 8.7 Likewise, economic development, such as encouragement of research, capital investment and innovation, can also be public benefits.³⁹
- 8.8 It is also recognised that cost savings accruing to one or few firms arising from increases in productive efficiency can constitute public benefits, even if the savings are not passed on to end consumers in the form of lower prices. This is because the community at large has an interest in resource savings, as these resources are released for use elsewhere in the economy.⁴⁰
- 8.9 The Corporate Restructure is a key step in Telstra achieving its T22 and T25 strategies, which includes separating out Telstra’s infrastructure assets. There are a range of public benefits that are commercially likely to result from the Corporate Restructure, that are more than ephemeral or trivial including:

(a) **Greater transparency of ServeCo and InfraCo Fixed within the Telstra Group**

Following the Corporate Restructure, ServeCo and InfraCo Fixed will be separate legal entities. The clearer separation between their respective businesses and financials will better allow and encourage management to drive performance of and efficiencies in the businesses. Each businesses’ performance will also be more easily monitored, reported and benchmarked.

The clearer separation will also provide greater transparency of the respective businesses, and allowing shareholders and potential investors to more accurately value each business based on their differing investment and return profiles. It will also reinforce the discipline with which capital allocation occurs across the Telstra Group.⁴¹

(b) **Enhanced focus on operations and strategy of each business, supporting innovation**

³¹ *Re Medicines Australia Inc* [2007] ACompT4 at 107.

³² *Re Sea Swift Pty Ltd* [2016] ACompT 9.

³³ *Port of Newcastle (No 2)* [2022] ACompT 1 [34] citing *Qantas Airways Limited* (2005), ACompT 9.

³⁴ *Re Application for Authorisation of Acquisition of Macquarie Generation* [2014] ACompT 1 at [164]; *Port of Newcastle (No 2)* [2022] ACompT 1 [53].

³⁵ *Port of Newcastle (No 2)* [2022] ACompT 1 [35]-[36].

³⁶ *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40- 012, at 17,242.

³⁷ *Qantas Airways Limited* (2005), ACompT 9.

³⁸ *Ibid.*

³⁹ *Re ACI Operations Pty Ltd* (1991) ATPR (Com) 50-108.

⁴⁰ ACCC Guidelines for Authorisation of Conduct (non-merger) (March 2019), 8.8.

⁴¹ See <https://exchange.telstra.com.au/telstra2022-our-plan-to-lead/>.

The modern portfolio structure created through the Corporate Restructure, including the separation of ServeCo and InfraCo Fixed, will sharpen the focus on the operations of, and facilitate individual strategies for, each business. This should assist shareholders, potential investors and other third parties to more accurately assess business value and enable Telstra to more quickly react to potential value-enhancing transactions (as discussed further below).

While Telstra has already adopted separate business units for its infrastructure and customer operations, the Corporate Restructure will formalise and enhance this separation, for example through the creation of separate Boards and management teams, supported by dedicated risk teams under a group-wide risk management and compliance framework.

InfraCo Fixed intends to bring in specialised asset managers to ensure that the assets are run as efficiently as possible over time, and to improve return on assets, which will produce benefits for the users of those assets, including technological innovators.

It will do this while limiting disruption to the Telstra Group's businesses, including its arrangements with NBN Co. The heightened standalone focus is expected to deliver value to Telstra shareholders over time.

The implementation of the Scheme will also enable the Telstra Group to continue focusing on creating innovative products and services, supporting customers and delivering an exceptional customer experience in line with Telstra's T22 strategy and new T25 strategy announced at Investor Day on 16 September 2021.

(c) Greater flexibility and optionality for potential future value realisation opportunities

The key drivers for the creation of a separate infrastructure business as part of Telstra's T22 strategy are the increasing importance and role of high quality telecommunications infrastructure which underpins the connectivity required for technological innovation, and the potential to fully optimise and realise the value of Telstra's infrastructure assets. The Corporate Restructure will better position the Telstra Group and its shareholders to do that, and also support continued technological innovation.⁴²

The Corporate Restructure will create optionality for both New Telstra Corp, and its key subsidiaries, to take advantage of opportunities that may arise over time. In particular, the legal separation of ServeCo and InfraCo Fixed will assist to facilitate the execution of any future potential value enhancing transactions by the Telstra Group in connection with those businesses in a timely and efficient manner, allowing the Telstra Group to take advantage of future market conditions and opportunities if they arise.

Importantly though, the Corporate Restructure does not provide for the Telstra Group to pursue such a transaction or act to effect any monetisation of InfraCo Fixed. All it does is create a corporate structure that provides optionality for potential value realisation opportunities in the future, which may or may not involve InfraCo Fixed. Any future decision to undertake a transaction will be subject to the New Telstra Corp Board and any other required approvals at that time.

(d) Other benefits associated with a passive infrastructure only business

The trend toward functional and legal separation within telecommunications industries has already gained momentum internationally, for reasons including financial and market motivations and operational and strategic benefits. These examples, and this trend more generally, demonstrate the concrete benefits and value resulting from restructuring telecommunications businesses to separate out the infrastructure components, as is proposed for InfraCo Fixed and ServeCo through the Corporate Restructure.

- 8.10 These are clear, tangible and non-trivial public benefits which are commercially likely to occur in the future with the Proposed Conduct. By way of example, the separation of the Telstra towers business

⁴² See <https://exchange.telstra.com.au/telstra2022-our-plan-to-lead/>.

in the form of Amplitel provides a tangible real-world example of the types of public benefits that Telstra expects will arise as a result of the Corporate Restructure, in particular with respect to providing optionality for potential value realisation opportunities in the future.

Public benefits of structural reform of the telecommunications industry

- 8.11 As outlined in section 5.4(b), the public detriments and benefits which arise from the existing arrangements (including the Definitive Agreements and Telstra's SSU and Migration Plan), as authorised under section 577BA, are not relevant to the Commission's assessment for the purpose of the Application. However, for completeness, it is noted that there are recognised public benefits that flow from these existing arrangements, which give effect to the Government's agenda for structural reform of the telecommunications industry.
- 8.12 As noted in the Explanatory Memorandum which inserted section 577BA:
- "Telstra's progressive migration of customers from its copper and subscription television cable networks to the new wholesale-only fibre network, in accordance with an undertaking accepted by the ACCC, is in the national interest and will promote structural reform of the telecommunications industry".⁴³*
- 8.13 The purpose of structural separation was to create:
- "a national outcome where there is a wholesale only network operating across the country which is not controlled by any retail company. Separation between the network provider and retail providers will mean better and fairer infrastructure access for service providers, greater retail competition and better services for consumers and businesses".⁴⁴*
- 8.14 The Proposed Conduct will allow the continuation of this structural reform sought by the Government in respect of the Australian telecommunications industry. This in turn provides continued certainty for industry, and reduces the potential for disputes within the industry.
- 8.15 It is Parliament's intention that the Parties (including ServeCo) and their related entities continue to give effect to this structural reform agenda following the Corporate Restructure *with the benefit of authorisation* for the purposes of the CCA. This is evident in the passing the New Authorisation Provision, in relation to which the Explanatory Memorandum noted:
- "Item 2 inserts a new provision into section 577BA... [which] provides authorisation under the [CCA] for designated Telstra successor companies and NBN corporations to re-point obligations and rights from existing contracts, arrangements and understandings to new Telstra entities or NBN entities, and may be necessary to effect the restructure. It also authorises conduct engaged in to give effect to those contracts, arrangements or understandings."⁴⁵*
- 8.16 NBN Co considers that authorisation of the Amending Agreement, including the business sale restriction provision, will ensure that the public benefits arising from the Definitive Agreements will not be eroded. From NBN Co's perspective, the key benefits arising from the Definitive Agreements are the delivery of structural reform and the facilitation of a commercially viable open access, wholesale only NBN consistent with the Government's objectives, and the benefits of that reform to consumers and competition. Those benefits are delivered by the Definitive Agreements as a package. NBN Co's view is that the Definitive Agreements enable, realise and/or facilitate the industry reform formulated by the Government because:
- (a) they provide for and maximise the migration of customers to the NBN Co network, by means of disconnection obligations supported by restrictions on Telstra's use and disposal of its

⁴³ Explanatory Memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010, page 4.

⁴⁴ Explanatory Statement, Telecommunications (Structural Separation—Networks and Services Exemption) Instrument (No. 1) 2011.

⁴⁵ Explanatory Memorandum, Telstra Corporation and Other Legislation Amendment Bill 2021.

copper or HFC network, network preference commitments and restrictions on marketing wireless substitution;

- (b) they contain business protections that help NBN Co establish a strong and sustainable business model, and operate as a sustainable, commercial business, consistent with the Government's objectives for the NBN and industry reform (and which are also consistent with the concept of structural separation as provided for in section 577A(1) of the Telco Act);
- (c) they enable NBN Co, where efficient and economical to do so (as required by the Statement of Expectations⁴⁶), to use Telstra's infrastructure;
- (d) they provide measures which ensure Telstra does not gain any material advantages over other retail services providers in connecting to the NBN, including ring-fencing arrangements in relation to the use of Telstra and NBN Co confidential information; and
- (e) they do not go beyond what is required to achieve the Government's policy objective of achieving structural separation and facilitating a viable open access wholesale only NBN.

- 8.17 The original Definitive Agreements were the culmination of almost two years of continuous negotiations between NBN Co and Telstra, reflecting the extremely complex and far-reaching nature of those negotiations, having regard to the legislative reforms. The December 2014 amendments to the Definitive Agreements to accommodate NBN Co's shift to a multi-technology mix model were the product of further complex, lengthy negotiations. The Definitive Agreements are a negotiated outcome, representing a fine balance between the long term needs and interests of each party, in order to ensure that the agreements will stand the test of time. In order to achieve the Government's policy objectives, it is essential that NBN Co, as a Government Business Enterprise, has a strong and sustainable business model. The Definitive Agreements contain a number of provisions which NBN Co views as critically important to enable NBN Co to achieve the objectives set out in the Government's Statement of Expectations, and for the structural reform of the industry to be achieved. They include the provisions identified in the Application, which are included in the Amending Agreement (subject to the amendments identified).
- 8.18 Given the contents of the Amending Agreement, NBN Co considers that the same benefit considerations apply to the Amending Agreement. NBN Co recognises that public benefits from the Definitive Agreements will also accrue in the counterfactual. However, NBN Co's view is that the Amending Agreement (as a whole) will help ensure the realisation of the significant public benefits from the Definitive Agreements.
- 8.19 NBN Co made significant payments to Telstra in consideration of the disconnection of customers from Telstra's legacy networks in accordance with the Definitive Agreements, and, in return, Telstra agreed to the business protections in the Definitive Agreements. The Amending Agreement and the application of the existing restrictions to ServeCo (and its business, if sold in the future via an asset sale, as a consequence of the new business sale restriction provision) will ensure that NBN Co continues to receive the value under the Definitive Agreements for which it has already paid, and remains well placed to deliver the Government's objective to "maximise the economic and social benefits of the NBN and for NBN Co to operate as a sustainable, commercial business".⁴⁷ As acknowledged in the Statement of Expectations⁴⁸, taxpayers have made a substantial investment in NBN Co (including to fund payments made to Telstra in consideration of the disconnection and business protections), and NBN Co considers that this investment should not be capable of being diluted by Telstra's restructure and subsequent dealings with its assets.
- 8.20 Further, NBN Co considers that, although Telstra may not have a current intention to dispose of the ServeCo business, ensuring that Telstra's subsidiaries are held to the promises made by Telstra under the Definitive Agreements, and that those promises cannot be avoided if ServeCo disposes of

⁴⁶ NBN Co Limited Statement of Expectations, 26 August 2021, at: <https://www.nbnco.com.au/content/dam/nbn/documents/about-nbn/policies/soe-shareholder-minister-letter-2021.pdf>.

⁴⁷ NBN Co Limited Statement of Expectations, 26 August 2021, at: <https://www.nbnco.com.au/content/dam/nbn/documents/about-nbn/policies/soe-shareholder-minister-letter-2021.pdf>.

⁴⁸ NBN Co Limited Statement of Expectations, 26 August 2021, at: <https://www.nbnco.com.au/content/dam/nbn/documents/about-nbn/policies/soe-shareholder-minister-letter-2021.pdf>.

its business via an asset sale in the future, will help ensure that the public benefits of the Definitive Agreements are realised in full.

9 Competitive effects

The Proposed Conduct is not likely to substantially lessen competition

- 9.1 The CCA does not define 'substantial lessening of competition'. It is generally accepted that conduct will substantially lessen competition if it has a meaningfully or relevantly adverse impact on the competitive process (rather than particular competitors), as compared to the counterfactual.⁴⁹
- 9.2 As outlined in section 5.4(b), in light of the counterfactual, the competitive effects arising from the Government's structural reform agenda, including the Subscriber Agreement and Implementation and Interpretation Deed, will (and it is the Government's intention that it) occur in both the counterfactual and factual scenarios, so it is not relevant for the Commission to consider them in assessing the Proposed Conduct.
- 9.3 The Proposed Conduct does not produce any additional competitive effects above that which already exist pursuant to the current arrangements, as there is no change to the outcome or intent of them as a result of the Amending Agreement. The only change is to the entity giving effect to or benefiting from them and/or their practical mechanics to reflect that intent. The new provisions dealing with liability as between InfraCo Fixed and ServeCo and ensure NBN Co maintains the benefit of the business protections vis-a-vis ServeCo in the future are also entirely consistent that intent and the market structure sought to be achieved by the Definitive Agreements.
- 9.4 NBN Co considers that the business sale restriction provision in the Amending Agreement will not lessen competition compared to the counterfactual, notwithstanding that the provision is not included in the current Definitive Agreements. There is no practical likelihood that, in the absence of the Corporate Restructure, a vertically integrated Telstra would sell the whole or substantially the whole of ServeCo's business by way of an asset sale, particularly without also needing to address the rights, benefits and obligations under the Definitive Agreements performed by that business. Of course any amendments to the Definitive Agreements to account for such a sale would require NBN Co's agreement, and NBN Co would seek to ensure that its existing rights and benefits were preserved. NBN Co therefore considers that there is no real chance (in the counterfactual) of a third party acquiring the whole or substantially the whole of ServeCo's business without being subject to the relevant business protections in the Definitive Agreements.
- 9.5 Finally, the Corporate Restructure itself will not have any detrimental impact on competition, including vis-à-vis NBN Co, for the reasons outlined above. It will not result in any increased market concentration, coordinated effects or foreclosure risks, or create any new barriers to entry.
- 9.6 It is an internal strategy, designed to enable Telstra to better realise the value of its infrastructure assets, take advantage of potential future value realisation opportunities and create additional value for shareholders.
- 9.7 The Corporate Restructure will not negatively impact customers' experiences in terms of products, pricing, services or the level of support they currently receive. Telstra considers that by increasing the focus on each business within the Telstra Group individually, InfraCo Fixed and Amplitel will be able to focus on optimising all aspects of Telstra's existing infrastructure, allowing ServeCo to focus on improving the customer experience and offerings, to the benefit of consumers as well as shareholders.

10 Conclusion

- 10.1 The Applicants submit that the Commission should authorise the Proposed Conduct because it will not result in any public detriment or adverse competitive effects but will generate clear public benefits,

⁴⁹ See e.g. *Rural Press Ltd v ACCC* [2003] HCA 75.

including greater transparency and additional value to shareholders over time, thus resulting in a net public benefit and no substantial lessening of competition.